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JUDICIAL CENTRE OF EDMONTON
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COURT FILE NO. 1703 12327

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF 667402 ALBERTA LTD., 18512398 ALBERTA LTD., 816956 ALBERTA LTD., 1371047 ALBERTA LTD., 1919209 ALBERTA LTD. AND CANADA NORTH GROUP LP HOLDINGS LTD.

DOCUMENT **BOOK OF AUTHORITIES TO THE BRIEF OF THE MONITOR, ERNST & YOUNG INC.**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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TAB 1

2016 ABQB 347
Alberta Court of Queen's Bench

Milavsky v. Milavsky Estate

2016 CarswellAlta 1206, 2016 ABQB 347, [2016] A.W.L.D. 2844, [2016] A.W.L.D. 2932, [2016] A.W.L.D. 2964, 267 A.C.W.S. (3d) 798

Marilyn Theresa Milavsky, Plaintiff/Respondent and Dwayne Lashyn, Charlene Molotsky and Gregory Milavsky, Executors of the Estate of Harold Philip Milavsky, Deceased, Defendant/Applicant

Marilyn Theresa Milavsky, Plaintiff/Respondent and Dwayne Lashyn, Charlene Molotsky and Gregory Milavsky, Executors of the Estate of Harold Philip Milavsky, Deceased; 353396 Alberta Inc.; and Gregory Milavsky, Dwayne Lashyn and Charlene Molotsky, Each as Trustees of Each of the Harold Milavsky Family Trust; H. Milavsky Residential Trust, The Harold Milavsky Grandchildren's Trust and Harold P. Milavsky Descendants' Trust, Defendants/Applicants

Bryan E. Mahoney J.

Heard: February 5, 2016
Judgment: June 24, 2016
Docket: Calgary 4801-139446, FL01-10034

Proceedings: additional reasons to *Milavsky v. Milavsky* (2015), 29 Alta. L.R. (6th) 410, 2015 CarswellAlta 1142, 2015 ABQB 395, Bryan E. Mahoney J. (Alta. Q.B.)

Counsel: Laurie E. Allen, Keith D. Marlowe, Caroline Smith, for Marilyn Milavsky
Robert W. Calvert, Q.C., for Estate of Harold Milavsky
Daniel J. McDonald, Q.C., for Trustees Gregory Milavsky and Charlene Molotsky
J.P. Peacock, Q.C., for Trustee Dwayne Lashyn and 353396 Alberta Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial; Estates and Trusts; Restitution

Related Abridgment Classifications

Estates and trusts
II Trusts
II.6 Miscellaneous

Headnote

Estates and trusts --- Trusts — Miscellaneous
Costs — Deceased and wife separated in 2009 and wife filed divorce and matrimonial property application — Later in 2009, deceased became incompetent, and he died in 2012 — In 2010, wife filed unjust enrichment and constructive trust action against certain defendants, claiming that deceased set up trusts and advanced property for purpose of defeating wife's claims — Defendants' application for summary judgment dismissing wife's claims was dismissed — Parties made submissions on costs — Costs awarded to wife — While application was not rare and exceptional, it was also not "run of the mill" chambers application — Wife was not successful on having summary judgment application dismissed on basis of abuse of process, however, she was successful in defending complex and voluminous application.

Table of Authorities

Cases considered by *Bryan E. Mahoney J.*:

Jacobi v. Newell (County No. 4) (1994), 19 Alta. L.R. (3d) 394, 28 C.P.C. (3d) 349, (sub nom. *Jacobi v. Board of Education of Aqueduct Roman Catholic Separate School District No. 374)* 153 A.R. 241, 1994 CarswellAlta 123 (Alta. Q.B.) — considered

Milavsky v. Milavsky (2011), 2011 ABCA 231, 2011 CarswellAlta 1290, 55 Alta. L.R. (5th) 382, 513 A.R. 282, 530 W.A.C. 282 (Alta. C.A.) — considered

Trizec Equities Ltd. v. Ellis-Don Management Services Ltd. (1999), 251 A.R. 101, 1999 ABQB 801, 1999 CarswellAlta 1469 (Alta. Q.B.) — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
R. 6.6 — considered

R. 6.7 — considered

Tariffs considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Sched. C, Tariff of Costs, item 8(1), column 5 — referred to

Sched. C, Tariff of Costs, column 5 — referred to

ADDITIONAL REASONS TO judgment reported at *Milavsky v. Milavsky* (2015), 2015 ABQB 395, 2015 CarswellAlta 1142, 29 Alta. L.R. (6th) 410 (Alta. Q.B.), concerning costs of estate litigation.

***Bryan E. Mahoney J.*:**

I. Introduction

1 This is a decision on the issue of costs. The Applicant/Defendants applied for summary judgment dismissing the Respondent, Marilyn Theresa Milavsky's ("Marilyn") matrimonial property and unjust enrichment actions against the H. Milavsky Residential Trust ("HMRT") and the trustees of the HMRT. Companion applications were brought by Gregory Milavsky and Charlene Molotsky, as well as Dwayne Lashyn. As a preliminary point, Marilyn asked this Court to dismiss the summary judgment application because it was an abuse of process. She submitted that the application was a re-litigation of issues already decided by the Court of Appeal at *Milavsky v. Milavsky*, 2011 ABCA 231 (Alta. C.A.) ("Milavsky 2011").

2 In January, 1990, Harold Milavsky ("Harold") and Marilyn began living together in a condominium in the Eau Claire district of Calgary. They married on 14 February, 1999 and separated on 20 February, 2009. Marilyn, within days of the separation, filed a divorce and matrimonial property action against Harold. Harold became incompetent in October 2009 and died December 4, 2012.

3 In 2010, Marilyn filed an unjust enrichment and constructive trust action against certain of the Defendants. This action claims that Harold set up trusts and advanced property for the purpose of defeating any claims Marilyn had that arose from their relationship.

4 The Application was heard on January 22, 2015, and February 2, 2015. With written reasons found at 2015 ABQB 395,

d. Marilyn flagrantly breached Rules 6.6 and 6.7 of the Rules of Court during the Summary Judgment proceeding as she failed to give proper notice of the affidavits upon which she intended to rely and deprived the Estate of an opportunity to cross-examine upon that material, which material was largely rife with inaccuracies and which contained inflammatory allegations and speculation. Marilyn ought to be rebuked for this conduct and there ought to be a meaningful financial consequence.

e. There is a set-off for costs that Marilyn owes to the Estate. In May 2014, she brought a special application with briefs before Justice McIntyre, in which she unsuccessfully sought an order compelling the Defendant Lashyn to respond to questions and provide additional records. According to a draft Bill of Costs the amount totaled $3,234.27.

9 In summary the Estate seeks an order that the cost consequences of the summary judgment application be deferred until after the determination of this matter at trial scheduled for Fall 2016. In the alternative, should the Court order the Estate to pay costs to Marilyn forthwith, it says that the costs ought to be paid into Court pending the outcome of this litigation and a final determination from the trial judge regarding costs. The Estate further says, if costs were to be awarded, they ought to be in accordance with the Bill of Costs proposed by counsel for the HMRT in the amount of $14,000.00.

IV. Joint Submissions of the Trustees of the HMRT

10 The HMRT submits that costs of the application for summary judgment should be in the cause. In the alternative, the HMRT submit that costs should be awarded in accordance with Schedule C, Column 5, Item 8(1), and that only one Bill of Costs should be awarded with respect to the HMRT Trustees.

11 The HMRT argues that there is no basis for the Court to depart from the normal rule, that costs are normally recovered on a party-party basis in accordance with Schedule C of the *Rules of Court*. HMRT points out that the application was for summary judgment was based on cross-examination transcripts and affidavit evidence that involved narrow questions of law relating to the H. Milavsky Residential Trust.

12 According to the HMRT, Marilyn is not entitled to costs approaching full indemnity, which are only granted in rare and exceptional circumstances. Costs should not be awarded to an otherwise successful party who has brought unfounded allegations of fraud or improper dealings. Additionally, the Marilyn's application to have the summary judgment applications dismissed on the grounds of abuse of process was also dismissed and should be accounted for accordingly in any costs award that is made.

V. Ruling on Costs

13 It is well established that Court awarded costs are premised on the assumption that a winning party is deserving of some compensation for legal costs incurred in establishing or defending its position. It is also well established that full indemnity of legal fees can significantly hamper a party's access to justice in some cases. *Alberta Law Reform Institute, Alberta Rules Project, Consultation Memorandum No. 12.17 February 2005.*

14 Typically, if a party is only successful in part of its application, that party recovers costs in proportion to the value of the successful part of the application and the respondent is entitled to costs proportionate to the value of the unsuccessful portion.

15 It is also well established in the decided cases that costs consequences are an effective mechanism for controlling litigation and discouraging frivolous claims. Not all unsuccessful cases are without merit, however, and parties should not be unduly punished for bringing a losing action. Nonetheless, a successful party on an application should be entitled to some level of recovery of lawyers' fees, as they were required to appear in court and successfully claim or defend their rights.

16 In *Jacobi v. Newell (County No. 4)* (1994), 19 Alta. L.R. (3d) 394 (Alta. Q.B.) at para 27, O'Leary J wrote:

A trial judge has a wide discretion when awarding costs among parties to litigation, provided that the discretion is exercised judicially, that is, by the application of established principles: *Jackson and Parkview Holdings Ltd. v. Trimac*

Industries Ltd. (1993), 138 A.R. 161 (Q.B.). In exercising that discretion, a trial judge must keep in mind the purpose of an award of costs and the policy considerations involved in setting the level of recovery. These matters were summarized by McDonald, J. in *Reese v. Alberta* (1992), 5 Alta. L.R. (3d) 40 (Q.B.), at p. 44:

> While the allocation of costs of a lawsuit is always in the discretion of the court, the exercise of that discretion must be consistent with established principles and practice. It is traditionally accepted in Canada's common law provinces that as a general rule the successful party recovers its costs from the unsuccessful party. However, such recovery is normally on a party-and-party basis. That is, the costs recoverable are those fees fixed for the steps in the proceeding by a schedule of fees (Sched. C. in Alberta's *Rules of Court*), plus reasonable disbursements. It is not intended that the successful party receive full indemnification of those fees and disbursements which it would be charged by its counsel. In England the degree of indemnification appears to be considerably higher than is found in Canada. In almost all jurisdictions of the United States of America the rule is that no costs are recoverable by the successful party.
>
> The Canadian practice reflects an attempt to balance two conflicting interests. On the one hand, it is argued that if a party is successful and there are no circumstances constituting blameworthiness in the conduct of the litigation by that party, it is unfair to require the successful party to bear any costs incurred by his counsel in prosecuting or defending the action. On the other hand, it is argued that if the unsuccessful party is required to bear all the costs of the successful party, citizens will be unduly hesitant to sue to assert their rights (even valid ones) or to defend their rights when sued. The partial indemnity practice as it exists in Canada is a compromise intended to give some scope in practice for each of the conflicting policy considerations.

17 In *Jacobi*, O'Leary J went on to state at para 30:

> Costs on an indemnification basis should be awarded only in rare and exceptional cases: *Canada Deposit Insurance Corp. v. Canadian Commercial Bank* (1987), 50 Alta. L.R. (2d) 1, 76 A.R. 271 (Q.B.). In *Jackson et al v. Trimac Industries Ltd., et al, supra*, Hutchinson J. said at p. 172:
>
>> In order for costs to be awarded on an indemnity basis or even on a solicitor-client basis, as opposed to a party-party basis, the court must conclude that the case fits within the parameters of a rare and exceptional or unusual case.

18 This was not a rare and exceptional application where costs on an indemnification basis are justified on the grounds of complexity or novelty. Nevertheless, it also was not a run of the mill special chambers application. Argument, as can be evidenced by the legal briefs and the time it took to hear the application, did require more extensive research.

19 Marilyn was unsuccessful in her application to have this summary judgment application denied on the basis of abuse of process. She was successful in defending this more complex and voluminous application for summary judgment.

20 Marilyn shall have her costs payable forthwith and calculated by using the draft Bill of Costs prepared by Marilyn's counsel, Caroline Smith, except for Column 5 amount will be doubled to $26,000.00 for fees. Disbursements are set at $2,734.52. GST is also payable.

Order accordingly.

TAB 2

2015 ABCA 304
Alberta Court of Appeal

RVB Managements Ltd. v. Rocky Mountain House (Town)

2015 CarswellAlta 1771, 2015 ABCA 304, [2015] A.W.L.D. 3920, [2015] A.J. No. 1025, 259 A.C.W.S. (3d) 247, 609 A.R. 55, 656 W.A.C. 55

RVB Managements Ltd. and Lavoy Property Development Ltd., Appellants (Plaintiffs) and The Town of Rocky Mountain House, Respondent (Defendant)

Marina Paperny J.A., Jack Watson J.A., Frans Slatter J.A.

Judgment: September 28, 2015
Docket: Edmonton Appeal 1403-0062-AC

Counsel: K.D Wakefield, Q.C., A.M. Simmonds, for Appellants
J. McGinnis, Q.C., G. Joshee-Arnal, for Respondent

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
XXIV Costs
XXIV.24 Appeals as to costs
XXIV.24.b Interference with discretion of lower court

Headnote

Civil practice and procedure --- Costs — Appeals as to costs — Interference with discretion of lower court
Plaintiffs advanced claim for $2.5 million against defendant for illegal diversion of water, resulting in remediation costs and delays in development of their lands — During litigation plaintiffs amended claim to $25 million — Plaintiffs lost at trial and received nothing — Trial judge awarded defendant costs of defending action — Plaintiffs challenged increase in costs to account for inflation and multiplication of Column 5 to account for size of claim — Plaintiffs appealed aspects of cost award — Appeal dismissed — Trial judges had wide discretion over costs — Trial judge awarded 25 per cent for inflation when actual inflation in Alberta was 39 per cent — Award for inflation did not demonstrate any miscarriage of justice — While there was no evidence that multiplication of Column 5 had led to over-indemnification of defendant, court said that trial judge's costs order should be interpreted as implicitly including cap on costs at full indemnity — Full indemnity would be applied to action as whole.

Table of Authorities

Cases considered:

Chisholm v. Lindsay (2015), 2015 ABCA 179, 2015 CarswellAlta 922 (Alta. C.A.) — distinguished

Conway v. Zinkhofer (2008), 2008 ABCA 392, 2008 CarswellAlta 1764 (Alta. C.A.) — referred to

Deans v. Thachuk (2005), 2005 ABCA 368, 2005 CarswellAlta 1518, 48 C.C.P.B. 65, 20 E.T.R. (3d) 19, 2005 C.E.B. & P.G.R. 8177 (headnote only), 52 Alta. L.R. (4th) 41, 261 D.L.R. (4th) 300, 376 A.R. 326, 360 W.A.C. 326, [2006] 4

W.W.R. 698, 23 C.P.C. (6th) 100 (Alta. C.A.) — referred to

Dool v. Nazarewycz (2009), 2009 ABCA 70, 2009 CarswellAlta 252, 2 Alta. L.R. (5th) 36, 46 E.T.R. (3d) 159, (sub nom. *Dool Estate, Re)* 448 A.R. 1, (sub nom. *Dool Estate, Re)* 447 W.A.C. 1, [2009] 7 W.W.R. 636 (Alta. C.A.) — referred to

Hill v. Hill (2013), 2013 ABCA 313, 2013 CarswellAlta 1785, (sub nom. *Hill v. Hill Family Trust)* 561 A.R. 50, (sub nom. *Hill v. Hill Family Trust)* 594 W.A.C. 50, 3 Alta. L.R. (6th) 302 (Alta. C.A.) — referred to

M. (N.) v. W. (F.) (2004), 2004 ABCA 151, 2004 CarswellAlta 559, 8 E.T.R. (3d) 117, 348 A.R. 143, 321 W.A.C. 143, 2 R.F.L. (6th) 87, 47 C.P.C. (5th) 253, 243 D.L.R. (4th) 220, 33 Alta. L.R. (4th) 17 (Alta. C.A.) — referred to

RVB Managements Ltd. v. Rocky Mountain House (Town) (2014), 2014 ABQB 51, 2014 CarswellAlta 156, 18 M.P.L.R. (5th) 193, 90 Alta. L.R. (5th) 215, 582 A.R. 1 (Alta. Q.B.) — referred to

RVB Managements Ltd. v. Rocky Mountain House (Town) (2015), 2015 ABCA 188, 2015 CarswellAlta 976, 38 M.P.L.R. (5th) 32 (Alta. C.A.) — referred to

Shillingford v. Dalbridge Group Inc. (2000), 2000 ABQB 28, 2000 CarswellAlta 48, 76 Alta. L.R. (3d) 361, [2000] 5 W.W.R. 103, 42 C.P.C. (4th) 214, 268 A.R. 324 (Alta. Q.B.) — referred to

Statutes considered:

Interpretation Act, R.S.A. 2000, c. I-8
s. 37 — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Generally — referred to

R. 10.31 — considered

R. 10.31(3)(a) — considered

R. 10.31(3)(b) — considered

R. 10.33 — referred to

R. 10.33 — considered

R. 10.33(1)(b) — considered

R. 10.41(3)(e)(ii) — referred to

Tariffs considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Sched. C, Tariff of Costs — referred to

Sched. C, Tariff of Costs, column 5 — referred to

APPEAL by plaintiffs from costs award made by trial judge.

The Court:

1 The appellants challenge the award of costs made against them by the trial judge.

2 The appellants advanced a claim for $2.5 million against the respondent for illegal diversion of water, resulting in remediation costs and delays in development of their lands. During the litigation they amended the claim to $25 million. At trial their position was that they should receive damages of $24,927,586 plus $500,000. They lost at trial and received nothing: *RVB Managements Ltd. v. Rocky Mountain House (Town)*, 2014 ABQB 51, 90 Alta. L.R. (5th) 215, 582 A.R. 1 (Alta. Q.B.). Their appeal was dismissed: *RVB Managements Ltd. v. Rocky Mountain House (Town)*, 2015 ABCA 188 (Alta. C.A.).

3 In unreported reasons, the trial judge awarded the successful respondent costs of the action. She noted that this was a lengthy (27 day) and complex trial, with a number of amendments to the pleadings, complex expert testimony, and voluminous documentation. After ruling on a number of discrete issues, she concluded that the amounts awarded by Schedule C should be increased by 25% to account for inflation.

4 The trial judge awarded costs for different stages of the trial:

(a) from commencement of the action to May 2007, she awarded costs on Column 5, plus 25% for inflation;

(b) from May 2007, after the claim had been amended to $25 million, she awarded double Column 5, plus 25% for inflation.

The trial judge noted that Column 5 addresses claims over $1.5 million, whereas the present claim was for many times that amount. This, she held, justified a multiple of Column 5.

5 The appellants challenge only the (i) increase in the costs to account for inflation, and (ii) the multiplication of Column 5 to account for the size of the claim.

6 Costs awards are discretionary and will not be interfered with unless the trial judge made an error in principle, misstated the law or made an overriding and palpable error: *Conway v. Zinkhofer*, 2008 ABCA 392 (Alta. C.A.), citing *Deans v. Thachuk*, 2005 ABCA 368, 376 A.R. 326 (Alta. C.A.) ; *Dool v. Nazarewycz*, 2009 ABCA 70 (Alta. C.A.) at para. 53, (2009), 448 A.R. 1 (Alta. C.A.) ; *M. (N.) v. W. (F.)*, 2004 ABCA 151, 33 Alta. L.R. (4th) 17, 348 A.R. 143 (Alta. C.A.).

Inflationary Adjustments

7 The amounts in Schedule C have not been updated since 1998. Since then the cost of living has increased by about 39%. While a number of trial judges have adopted the practice of increasing the amounts in Schedule C to allow for inflation, the appellants argue that this is unjustified. They note that when the new Rules of Court were adopted in 2010, the amounts in Schedule C were not changed. Thus, they argue, the old 1998 amounts were "confirmed" in 2010, and no inflationary adjustment is called for.

8 The 2010 re-enactment of the Rules of Court was made based on recommendations from the Alberta Law Reform Institute. The Institute did not examine the amounts provided for in Schedule C, stating in para. 32 of its Consultation Memorandum No. 12.17, *Costs and Sanctions*, that this was "beyond the scope of the Rules of Court Project". Section 37 of the *Interpretation Act*, RSA 2000, c. I-8, displaces any assumption that the repeal and substitution of an enactment was intended to either confirm or change the prior law. The re-enactment of the Rules continued the historically wide discretion of trial judges to award costs, and was made against the background of numerous judicial decisions that had been adjusting Schedule C for inflation. The re-enactment should be interpreted on the assumption that, where appropriate, that practice could continue.

9 The appellants cite a number of cases in which judges declined to adjust Schedule C for inflation, including *Chisholm v. Lindsay*, 2015 ABCA 179 (Alta. C.A.) at paras. 48, 53, which upheld an award of costs at trial which did not include an inflationary adjustment. *Chisholm* does not stand for the proposition that Schedule C must or must not be adjusted for inflation. It merely confirms at para. 49 that trial judges have a wide discretion over costs, and that the costs award in that

case (considered globally) did not contain any error warranting appellate interference.

10 The appellants also argue that the trial judge erred because there was no evidence presented of the amount of inflation experienced in Alberta. The fact that the cost of living varies over time is sufficiently notorious that notice can be taken of it. The exact amount of inflation is something upon which evidence should ordinarily be presented. The trial judge awarded 25%, whereas the Bank of Canada online Inflation Calculator indicates that the average increase in the cost of living in Canada since 1998 has been approximately 39%. While more exact evidence would have been desirable, the award of 25% for inflation does not demonstrate any miscarriage of justice.

11 The re-enactment of Schedule C in 2010 does not limit a trial judge's discretion to set the quantum of costs. The amounts in Schedule C are presumptive amounts only. Rule 10.31(3)(a) allows a judge to award costs "with or without reference to Schedule C": *Hill v. Hill*, 2013 ABCA 313 (Alta. C.A.) at para. 38, (2013), 561 A.R. 50 (Alta. C.A.) . The criteria for exercising the court's discretion over costs found in R. 10.33 would lose much of their meaning if the Court was nevertheless bound by the amounts in Schedule C. It was not an error in principle for the trial judge to adjust the costs for inflation, and that aspect of the award does not reflect any other reviewable error.

Multiples of Column 5

12 The appellants argue that Column 5 of Schedule C covers all claims over $1.5 million, and that it was an error to award a multiple of that column because of the size of the claim.

13 Rule 10.31 continues the broad discretion that trial judges have over costs, and R. 10.31(3)(b) specifically authorizes the trial judge to award "a multiple, proportion or fraction of an amount set out in any column of the tariff". Rule 10.33 lists the criteria to be considered, and includes in R. 10.33(1)(b) "the amount claimed and the amount recovered". It is common practice for trial judges to award multiples of the columns for various reasons, and given the express provisions of the rule it was not an error of principle for this trial judge to award a multiple of the Column because of the size of the claim: *Hill v. Hill* at para. 39.

14 The appellants argue that the trial judge failed to consider whether awarding a multiple of Column 5 would result in the respondent receiving more than full indemnity for its legal fees. The appellants correctly point out that the philosophy behind the costs rules is that litigants will only be partly indemnified by an award of costs, and, except in exceptional circumstances, costs awards should not result in over-indemnification: *Shillingford v. Dalbridge Group Inc.*, 2000 ABQB 28 (Alta. Q.B.) at para. 17, (2000), 268 A.R. 324, 76 Alta. L.R. (3d) 361 (Alta. Q.B.) .

15 The respondent does not challenge the general principle that over-indemnification is inappropriate, but merely alleges that there is no evidence of any over-indemnification. Such evidence would, obviously, be particularly under the control of the respondent. In order to avoid further expense, the trial judge's costs order should be interpreted as implicitly including a cap on costs at full indemnity. Full indemnity for this purpose would be applied to the action as a whole, not to any of the discrete steps mentioned in Schedule C. If the parties are unable to resolve any remaining dispute over this issue, the assessment officer can ensure that there is no over-indemnification under R. 10.41(3)(e)(ii).

Conclusion

16 In conclusion, the appellants have not demonstrated any reviewable error in the costs award, and the appeal is dismissed.

Appeal dismissed.

End of Document

TAB 3

2019 ABQB 275
Alberta Court of Queen's Bench

R&R Consilium Inc v. Talbot

2019 CarswellAlta 788, 2019 ABQB 275, [2019] A.W.L.D. 1820, [2019] A.W.L.D. 1864, 305 A.C.W.S. (3d) 44

R&R Consilium Inc. and Ranbir (Ron) Kang (Applicants) and Keith Talbot, Marvin Jones, and Weslease Income Growth Fund (Respondents)

G.A. Campbell J.

Judgment: April 18, 2019
Docket: Calgary 1801-06978

Counsel: Jerry J. Patterson (written), Lorne J. Graburn (written), for Applicants
Liam Oddie (written), for Simmons Financial Restructuring Corp.
Peter T. Linder, Q.C. (written), for Respondents

Subject: Civil Practice and Procedure; Estates and Trusts

Related Abridgment Classifications

Civil practice and procedure
XXIV Costs
XXIV.8 Scale and quantum of costs
XXIV.8.d Quantum of costs
XXIV.8.d.ii Allowance of increased costs

Estates and trusts
III Trustees
III.5 Practice and procedure
III.5.d Costs
III.5.d.ii Miscellaneous

Headnote

Civil practice and procedure --- Costs — Scale and quantum of costs — Quantum of costs — Allowance of increased costs
Trust was income growth fund in which two unitholders had interest — Unitholders distributed extraordinary resolution in writing seeking removal of trustees and appointment of one unitholder and two other individuals as trustees — Resolution appeared to pass with level of unitholder support in excess of 2/3 majority required by declaration of trust — Dispute arose as to whether required level of support had actually been reached by stipulated deadline — Unitholders successfully brought application for declaration that resolution was valid and binding on trust — Parties made submissions on costs, with unitholders seeking solicitor and own client costs of $251,757.50 or enhanced costs, along with disbursements and GST — Trust and trustees were required to pay enhanced costs of $38,000 increased by 40 per cent to $53,200 to account for inflation, as well as disbursements of $5,397.42 and applicable GST, with issue of whether trustees were entitled to be indemnified by trust to be pursued elsewhere — Unitholders were also entitled to recover from trust alone full expert fees in amount of $25,000 and applicable GST — Unitholders had ultimately been successful with application, and circumstances did not justify departing from over-arching principle that successful parties are entitled to costs — While unitholders had undertaken imperfect resolution process and provided imperfect record to trustees, resolution process had been compromised by declaration of trust, which had not provided for any process for tabulating resolutions — Verification of resolution process

had been further hampered by trust's failure to keep updated, fulsome registered list of unitholders — This was not type of rare and exceptional circumstance with such intentional scandalous or reprehensible litigation misconduct that would justify award of solicitor and own client costs, but enhanced costs were warranted as this was costly commercial litigation that settled critical matter for trust.

Estates and trusts --- Trustees — Practice and procedure — Costs — Miscellaneous
Expert fees — Trust was income growth fund in which two unitholders had interest — Unitholders distributed extraordinary resolution in writing seeking removal of trustees and appointment of one unitholder and two other individuals as trustees — Resolution appeared to pass with level of unitholder support in excess of 2/3 majority required by declaration of trust — Dispute arose as to whether required level of support had actually been reached by stipulated deadline — Unitholders successfully brought application for declaration that resolution was valid and binding on trust — Parties made submissions on costs, with unitholders seeking solicitor and own client costs of $251,757.50 or enhanced costs, along with disbursements and GST — Unitholders were awarded enhanced costs of $38,000 increased by 40 per cent to $53,200 to account for inflation, as well as disbursements of $5,397.42 and applicable GST — Unitholders were also entitled to recover from trust alone full expert fees in amount of $25,000 and applicable GST — Expert had been appointed by court as independent scrutineer due to difficulties with resolution process attributable to both sides and conflicting evidence provided by parties — Expert's evidence was helpful and of assistance to court in deciding whether to accept or reject identified questionable or deficient votes and confirm number of unitholders in favour of resolution — Expert's independence had not been compromised, and its evidence was of assistance not only to both sides but also to trust and its unitholders — Trust alone was ultimate beneficiary of expert evidence and so was required to pay this expense.

Table of Authorities

Cases considered by *G.A. Campbell J.*:

Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd. (2012), 2012 ABQB 438, 2012 CarswellAlta 1387, 75 Alta. L.R. (5th) 210 (Alta. Q.B.) — referred to

Blaze Energy Ltd. v. Imperial Oil Resources (2014), 2014 ABQB 509, 2014 CarswellAlta 1498 (Alta. Q.B.) — considered

Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. (1998), 1998 CarswellAlta 368, 216 A.R. 304, 175 W.A.C. 304, 61 Alta. L.R. (3d) 256, [1998] 10 W.W.R. 736, 1998 ABCA 118 (Alta. C.A.) — referred to

Goska J. Nowak Professional Corp. v. Robinson (2016), 2016 ABCA 240, 2016 CarswellAlta 1543, 34 C.C.E.L. (4th) 3, 40 Alta. L.R. (6th) 289 (Alta. C.A.) — referred to

RVB Managements Ltd. v. Rocky Mountain House (Town) (2015), 2015 ABCA 304, 2015 CarswellAlta 1771, 609 A.R. 55, 656 W.A.C. 55 (Alta. C.A.) — referred to

Seidel v. Kerr (2004), 2004 ABCA 157, 2004 CarswellAlta 582, 348 A.R. 154, 321 W.A.C. 154, 27 Alta. L.R. (4th) 227, [2004] 8 W.W.R. 510 (Alta. C.A.) — referred to

Trizec Equities Ltd. v. Ellis-Don Management Services Ltd. (1999), 251 A.R. 101, 1999 ABQB 801, 1999 CarswellAlta 1469 (Alta. Q.B.) — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Generally — referred to

R. 10.33(1) — referred to

R. 10.33(2) — referred to

Tariffs considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Sched. C, Div. 1, s. 1(4) — considered

Sched. C, Tariff of Costs, column 1 — referred to

Sched. C, Tariff of Costs, column 5 — referred to

ADJUDICATION on costs.

***G.A. Campbell J.*:**

1 The Applicants, R&R Consilium Inc. and Ranbir (Ron) Kang, commenced an originating application against Keith Talbot (Talbot), Marvin Jones (Jones) and Weslease Income Growth Fund (the Trust) (collectively, the Respondents) seeking to have an extraordinary resolution of unitholders of the Trust declared valid and binding on the Trust as of 9 May 2018 (the Application). The Applicants were ultimately successful on their Application.

2 The parties could not agree on costs. The Applicants seek solicitor and own client costs or enhanced costs and recovery of expert fees from Talbot and Jones. The Respondents, Talbot and Jones, oppose any such costs awards and argue that, in the circumstances, each party should pay their own legal costs.

Background

3 For context, some of the relevant background facts are reviewed.

4 In April 2018, the Applicants instructed its agent to send to all unitholders of the Trust an extraordinary resolution in writing that asked unitholders to vote in favor of the resolution (the Removal Resolution) that would remove the Trustees, who at the time were Talbot and Jones (together the Trustees), and appoint Kang and two others as the new trustees of the Trust (the New Trustees).

5 Wheelhouse Support (Wheelhouse) was retained to manage the voting process and act as scrutineer in verifying and tallying Removal Resolutions received from unitholders.

6 On 23 April 2018, the Applicants' agent gave written notice to the Trustees (the Trustee Removal Notice) that, as at 20 April 2018, (the Effective Date) the Removal Resolution had passed with 67.51% of all the Trust's unitholders in support, which was more than the 66 2/3 % of the outstanding units required for removal and replacement of the Trustees under the Trust's Declaration of Trust (the Declaration of Trust).

7 On 24 April 2018, the Trustees asked for the Removal Resolutions and the signed authorizations to establish that the Removal Resolution had passed by the requisite number of unitholder votes.

8 After review of the Removal Resolution information, the Trustees raised concerns regarding the tabulation of the Removal Resolutions. They determined that the Removal Resolution had been validly executed by only 62.39% of the unitholders as of 20 April 2018, which was the date stipulated in the Trustee Removal Notice. The Trustees advised the Applicants that they would not give effect to the Removal Resolution as it had not been passed with the requisite majority in accordance with the terms of the Declaration of Trust. The Trustees advised they would therefore continue to act as the Trustees.

9 The Applicants disagreed, relying on the Wheelhouse tabulation, which showed that the requisite threshold of 66 2/3 % support had been obtained as at 20 April 2018.

tabulating process that resulted in the need for a court-appointed scrutineer to validate and count the Removal Resolutions. Proper tabulation of the Removal Resolutions was further compromised when the Applicants interfered with the independence of the court-appointed scrutineer, Kingsdale, which resulted in the court assuming a chairperson role and ruling on the validity of the Removal Resolutions.

31 Talbot and Jones contend that they acted entirely proper and consistent with their fiduciary duties owed to the Trust and its unitholders. They did not believe that the take-over of the Trust by the New Trustees was in the best interests of the unitholders and they acted entirely proper in taking the steps they did to determine if the Removal Resolution had in fact passed on 23 April 2018, being the date of the Trustee Removal Notice sent to them. Talbot and Jones assert that they owed a duty to the unitholders not to allow the New Trustees, who had not been duly elected in accordance with the Declaration of Trust, to replace them and take over control of the Trust's property to the potential detriment to unitholders. They point out that at the time of the Application they were receiving no compensation from the Trust.

32 Talbot and Jones argue that if the Applicants had followed a simple and proper process that would have validated that the Removal Resolution had passed has of 23 April 2018, this litigation would have been wholly avoided or resolved quickly. Consequently, each party should bear their own court costs.

33 In any event, Talbot and Jones contend that none of their conduct undertaken in this Application would warrant an award of solicitor and own client costs against them as Trustees. They say there are no rare and exceptional circumstances here to suggest that their conduct as Trustees was reprehensible, scandalous or outrageous. Rather, as Trustees, it was their fiduciary duty to question the Removal Resolution and not to give effect to a resolution that had not, on the face of the record provided to them, passed with the requisite number of supporting unitholders.

34 Talbot and Jones reject any suggestion that they delayed this Application to give them time to place the Limited Partnership into bankruptcy or seek creditor protection. They took the steps they did because the Limited Partnership was insolvent and needed creditor protection. They also say that any delays were caused by the Applicants' tendering of successive curative evidence in an effort to shore up their deficient Removal Resolutions, which continued right up until the hearing of the Application on 29 June 2018.

35 Talbot and Jones submit that the circumstances here differ greatly from the *Blaze Energy* case, in which a costs award was made applying a multiplier to Column 5 of Schedule C. Talbot and Jones say that because declaratory relief was sought here and no monetary amount was in dispute that the default under Schedule C would be Column 1.

36 Talbot and Jones submit that the Applicants should not be able to recover the Kingsdale fees because its evidence was rejected by the court and the Applicants had compromised Kingsdale's independence.

37 Talbot and Jones submit that because they are entitled to be indemnified for legal fees incurred by them in properly responding to the Application, any costs awarded should be awarded against the Trust alone.

Applicable Legal Principles

38 It is well-accepted law that costs awards are in the Court's discretion. However, that discretion is to be exercised judicially, with a sound basis for making a costs award that, overall, is reasonable in the circumstances.

39 A party who is substantially successful following a contested application should normally be awarded costs, absent other considerations.

40 In making a costs award, the Court may consider any matter related to the question of reasonable and proper costs that the Court considers appropriate (*Rule* 10.33(1)). In deciding whether to impose, deny or vary an amount in a costs award, the Court may consider all the relevant circumstances including: the result of the action and the degree of success of each party; the importance of the issues; complexity of the action; conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action; a party's denial of or refusal to admit anything that should have been admitted; and, whether any application, proceeding or step in an action was unnecessary, improper or a mistake (*Rule* 10.33(2)).

41 Generally, there are three types of costs awards (***Trizec*** at para 19):

1. Solicitor and own client or full indemnity costs - the successful party receives complete indemnification of their legal fees, which may also include payment for other services that are not essential to the litigation in the case;
2. Solicitor-client costs - the successful party receives its reasonable legal fees and disbursements, which may not amount to complete indemnification; and
3. Party-party costs - is the usual costs award in which the successful party receives the costs under Schedule C to the Rules, which may be "enhanced" to an amount more than those amounts set out in Schedule C using some multiplier thereof, extra lump sums, some percentage of solicitor and own client costs or some other reasonable calculation, together with reasonable disbursements.

42 The case law recognizes that a departure from party and party costs should only be made in rare and exceptional circumstances.

43 The case law also establishes that, generally, solicitor and own client costs are only to be awarded against a party in cases where that party has engaged in reprehensible, scandalous or outrageous conduct during the course of the litigation: *Goska J. Nowak Professional Corp. v. Robinson*, 2016 ABCA 240 (Alta. C.A.) (CanLII) at para 30.

Analysis

No Costs Award

44 Ultimately, the Applicants were successful with their Application and the circumstances here do not justify departing from the over-arching principle that the successful party, the Applicants, are entitled to costs.

45 As urged by Talbot and Jones, I considered the imperfect resolution process undertaken by Applicants and that the Applicants provided an imperfect record to them as the Trustees.

46 Wheelhouse's records were not meticulously kept. Misplaced Removal Resolutions were provided to the Trustees when later found. This imperfection contributed to the difficulties the Trustees and the Court had in verifying whether the requisite Removal Resolutions had been obtained to pass the Removal Resolutions as at the Effective Date. However, and of significance in declining to make a no costs award as urged by Talbot and Jones, the resolution process undertaken by the Applicants was compromised by the Trust's Declaration of Trust itself, which did not provide for any process for tabulating resolutions, such as mandating a process for determining qualifying and disqualifying resolutions received, revoking resolutions once cast, the appointment of a chairperson to rule on questionable resolutions and so on. Verification of the resolution voting process was further hampered by the Trust's failure to keep an updated, fulsome registered list of unitholders, which led to issues with unitholders that used both an English and a Chinese name, joint unitholders but with only one name recorded on the register, unit holders that had supposedly redeemed their units but whose names remained recorded on the register, and presumably dated signatures, which led to questions about signatures that did not match those on the register and allegations of forgery.

47 It was these issues together with the conflicting evidence provided by the parties that resulted in the court-ordered appointment of the independent scrutineer, Kingsdale.

48 Finally, given the increasing support for the Removal Resolution by the unitholders, the continuation of Talbot and Jones as Trustees was doomed. Even with the Removal Resolutions that were disqualified for technical non-compliance, the Applicants could have served a new notice of removal to the Trustees advising of their removal once again a few days later. The futility of these Trustees' actions and assertions were ultimately confirmed at the June 29 hearing of the Application. The Trustees were not successful in their contest, the Applicants were.

49 In the result, the Applicants are entitled to a costs award.

50 The question is what are the appropriate costs to award here.

Solicitor and Own Client Costs Award

51 I am not satisfied that this is the type of rare and exceptional circumstance with such intentional scandalous or reprehensible litigation misconduct that would justify an award of solicitor and own client costs in favour of the Applicants.

52 Much of the Applicants' assertions of the Trustees' misconduct such as breach of fiduciary duty, abuse of process, engaging in wilful misconduct, withholding financial statements are assertions and allegations that were not proven in this proceeding and, indeed, have been strenuously disputed by Talbot and Jones. For example, I did not find instructing a Trust employee to find reason to exclude Removal Resolutions reprehensible or scandalous misconduct. If there was a good reason, a Removal Resolution should be excluded and some were excluded. The Applicants were asserting that they had the requisite Removal Resolutions and the onus lay with them to ensure that they had valid Removal Resolutions.

53 Notwithstanding the Applicants' assertions, my view is that the Trustees were justified and acted properly in asking for more information to verify the results of the Removal Resolution. They were entitled to take reasonable steps and make reasonable inquiries to satisfy themselves, in their position as the Trustees of the Trust, that the Removal Resolution had in fact passed as of the Effective Date. Further, advancing a position with little or no merit is not itself a ground for awarding solicitor and own client costs: *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2012 ABQB 438 (Alta. Q.B.) (CanLII) at para 18.

54 That said, the Trustees did take some unreasonable positions - for example, refusing to accept votes by unitholders that used the dollar value rather than the number of units (easily verified as one unit was $10), suggesting that the Applicants had undermined the independence of Kingsdale, which was not validated, and were unreasonably resistant on many fronts, adding to the complexity and cost of the litigation. However, some of the concerns raised required independent examination and judicial resolution.

55 There was, however, an aspect of misconduct, in that the Trustees raised technical issues of non-compliance that arose from their own deficient recordkeeping practices. Their complaints about the propriety of "curative" evidence was quite misplaced as this was the only way to determine whether their claims of invalid Removal Resolutions had merit. More concerning were the circumstances surrounding their allegations of forged signatures, which were seemingly pointed at the Applicants but fell short of actual accusations. There was also their letter writing campaign, which was certainly indicative of the fact that Talbot and Jones did not want to be replaced as Trustees and were actively soliciting unitholders to withdraw their cast Removal Resolutions.

56 However, I do not find their litigation misconduct was such so as to warrant full indemnification costs on a solicitor and own client basis. Their actions are more properly addressed by enhanced costs, not solicitor and own client costs.

Enhanced Costs

57 Notwithstanding the Applicants' imperfect resolution voting process, enhanced costs are warranted as this was costly commercial litigation that settled a critical matter for the Trust - effect was given to unitholder desires as to who were to be their Trustees - and this settlement required intensive litigation and on an expedited basis.

58 The Applicants claim that their lawyers completed certain tasks as reflected in their draft Bill of Costs and that they have spent $251,775 for those legal services. No detailed statement of account was provided and these legal fees appear not to have been assessed for reasonableness under the *Rules*.

59 The Applicants' draft Bill of Costs on Column 5 would provide for taxable costs of $19,000 plus disbursements and GST. If enhanced costs exceeding 40% to 50% of the Applicants' solicitor and own client costs of $251,775 were ordered as requested by the Applicants, this would amount to something more than $125,000 for four chamber appearances and related cross-examinations on affidavits and preparation of related documentation.

60 Talbot and Jones, relying on section 1(4) of Schedule C, suggest that the appropriate column for any award of party and party costs would be Column 1 because only declaratory and no monetary relief was sought. Section 1(4) of Schedule C says that a costs award is based on Column 1 when no monetary relief is claimed.

61 When no monetary relief is sought, it may be appropriate to depart from Column 1 of Schedule C due to the complexity of the litigation, the amount potentially at stake and if there is much to win or lose for the parties: *Blaze Energy* at para 80. Further considerations include actual solicitor-client fees charged far exceeding Schedule C amounts, which have not kept pace with inflation, where some steps taken are duplicative, unnecessary or overcautious and where there has been misconduct by the losing party.

62 The circumstances here support a departure from Column 1 of Schedule C.

63 The Application was moderately complex and it was necessary for the Applicants to respond to changing claims. Assuming the actual legal costs of some $250,000 are reasonable and proper (and there is no evidence they are not), they far exceed the amounts that would be provided under any Column of Schedule C. As the Applicants were seeking to wrest control of the Trust from the Trustees, the importance of resolving this issue for the parties and the Trust and its unit holders was substantial. The Application would result in new Trustees for the Trust and new stewardship of its considerable assets. The value of the assets sought to be interfered or controlled with in this case significantly exceeded the threshold amount of $1.5 million contemplated by Column 5 of Schedule C. While only declaratory or non-monetary relief was sought here, given the economically significant outcome to the Respondents, both the Trust and the Trustees, the value of the assets sought to be controlled or interfered with, would provide a reasonable basis for assessing what would be the appropriate Column of Schedule C when ordering party and party tariff costs.

64 For these reasons, column 5 of Schedule C is the appropriate Column.

65 The Court is not restricted to awarding costs pursuant to the amounts set out in Schedule C of the *Rules*.

66 In deciding this costs issue, the court is given wide latitude to adjust Schedule C if tariff costs would provide an inadequate result. Accepted adjustments have included among others: a higher column; multipliers of a column; extra lump sums; some form of solicitor and client costs and adjustments for inflation. Ultimately, the court must assess what would be a reasonable final costs amount: *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, 1998 ABCA 118 (Alta. C.A.) at para 4.

67 In determining the reasonable costs for the Application, the following factors were considered:

1. The Application was a moderately complex commercial matter and consisted of four contested chambers applications, extensive affidavit evidence, including cross examinations and preparation of lengthy briefs and associated documentation on an escalated time line;
2. The issue in dispute required independent verification of Removal Resolutions received by the Applicants - a step necessitated by the Trustees' contest of the validity of the Removal Resolutions received and somewhat by deficiencies in the Removal Resolution information provided by the Applicants;
3. Curative evidence was required to prove the validity of certain of the Removal Resolutions, which delayed and complicated the Application; this extra step resulted largely from the Trust's recordkeeping practices and its Trustees' unreasonable positions. Examples of curative evidence included confirmation that a Removal Resolution had been signed by the unitholder and not forged; confirmation that an English name used was the same person who had provided the Trust with only their Chinese name; confirmation that dollar values used were mistakenly used instead of the number of units held; and, confirmation that a signatory received was an unrecorded joint unitholder;
4. The Trustees' alleged that certain unitholder's signatures on the Removal Resolutions could have been forged because they did not match that on the Trust register even though the evidence showed the Removal Resolutions had been sent to the address given on the Trust's register. These unfounded allegations delayed and complicated the Application because rather than simply contacting the individual unitholder to verify they had signed the Removal Resolution, an unhelpful handwriting expert's opinion was obtained which did not prove the allegations;
5. While there were issues with some of the Removal Resolutions, the Applicants received Removal Resolutions on all three counts undertaken (Wheelhouse, Kingsdale, and the court) that exceeded the requisite majority for passing of the Removal Resolution;
6. The evidence demonstrated that the number of unitholders in favour of the Removal Resolution were increasing every day after the Effective Date, notwithstanding the Trustees were actively soliciting unitholders to revoke their Removal Resignations; and

7. The Trustees complicated and delayed the process when they called into question the independence of the court appointed scrutineer, although there was no substantiated basis for their assertion. The court's decision to review the Removal Resolutions was not because of any lack of independence on the part of Kingsdale but rather to settle the parties' differing positions.

68 Considering these matters, I do not think that using a percentage of the incurred solicitor and own client legal fees would provide an appropriate result because to do so would provide partial indemnity for all legal expenses incurred with no assessment as to whether they were reasonable or proper for a moderately complex litigation completed in a short time with some defensive misconduct.

69 Rather, I am satisfied that ordering the Respondents, namely Talbot, Jones and the Trust, to pay a multiplier to the costs calculated using Column 5, Schedule C, is an appropriate way to measure the Applicants' reasonable and proper costs in this case. I therefore award enhanced costs of double the calculated Column 5 costs of $19,000, for total enhanced costs of $38,000.

70 Gauged against the actual legal fees incurred here, it is clear that the costs provided for under Column 5 of Schedule C are severely out dated and do not provide a fair current money value for the efforts undertaken by the Applicants to obtain the relief they sought. While no evidence was provided, our Court of Appeal in 2015 noted that the Bank of Canada online Inflation Calculator indicated that the average cost of living in Canada since 1998 has been approximately 39%: *RVB Managements Ltd. v. Rocky Mountain House (Town)*, 2015 ABCA 304 (Alta. C.A.) (CanLII) at para 10. The enhanced costs awarded here will be increased by 40% as an adjustment for inflation that will bring the total costs award to $53,200 plus the disbursements of $5397.42 and the applicable GST, which I find are reasonable disbursements in this case.

Expert Fees

71 I next consider next the fees incurred for retaining the independent scrutineer, Kingsdale.

72 Our Court of Appeal has endorsed the principle that the primary factor in awarding expert witness costs is whether the expenditure was reasonable at the time incurred: *Seidel v. Kerr*, 2004 ABCA 157 (Alta. C.A.) (CanLII).

73 Given the dispute between the parties as to the validity of some of the Removal Resolutions and concerns with the manner in which the Applicants' agent handled the Removal Resolution solicitation process, the Court ordered that the Applicants retain an independent scrutineer to confirm the Removal Resolutions received.

74 Kingsdale, the entity ultimately chosen by the parties to act as independent scrutineer, provided the Kingsdale Report. Kingsdale, as detailed in the Kingsdale Expert Report, reviewed all the Removal Resolutions received by the Applicants, identified deficient Removal Resolutions and gave reasons, based on the accepted industry standards set out in *The Securities Transfer Association of Canada Protocol*, for accepting or rejecting a Removal Resolution.

75 While I did not accept all of the conclusions in the Kingsdale Report, the information it provided was helpful and of assistance to the Court in deciding whether to accept or reject the identified questionable or deficient Removal Resolutions and confirm the number of unitholders in favour of the Removal Resolution.

76 Despite the contentions of Talbot and Jones, I was not persuaded that Kingsdale's independence had been compromised and that contention did not factor into my reasons for rejecting some of Kingsdale's conclusions and opinions.

77 In my view, the expert evidence provided by Kingsdale was of assistance to both sides, and, overall, of particular assistance to the Trust and its unitholders as this evidence was very instrumental in ensuring that proper effect was given to unitholders' intentions as to who would be the Trust's Trustees and as such responsible for stewardship of the Trust's property.

78 I am satisfied that it was reasonable to retain Kingsdale and its fees for the services it provided to the Court were reasonable.

TAB 4

2012 ABQB 61
Alberta Court of Queen's Bench

Strategy Summit Ltd. v. Remington Development Corp.

2012 CarswellAlta 120, 2012 ABQB 61, [2012] 4 W.W.R. 832, [2012] A.W.L.D. 1179, [2012] A.W.L.D. 1195, [2012] A.W.L.D. 1196, [2012] A.W.L.D. 1198, [2012] A.W.L.D. 1200, [2012] A.W.L.D. 1201, [2012] A.W.L.D. 1211, [2012] A.W.L.D. 1212, [2012] A.W.L.D. 1214, [2012] A.W.L.D. 1270, [2012] A.W.L.D. 1271, 212 A.C.W.S. (3d) 914, 528 A.R. 273, 56 Alta. L.R. (5th) 102

Strategy Summit Ltd. (Plaintiff) and Remington Development Corporation (Defendant)

Gerald A. Verville J.

Heard: January 19, 2012
Judgment: January 24, 2012
Docket: Calgary 0601-01094

Proceedings: additional reasons to *Strategy Summit Ltd. v. Remington Development Corp.* (2011), 2011 ABQB 549, 2011 CarswellAlta 1616, 52 Alta. L.R. (5th) 155 (Alta. Q.B.)

Counsel: Graham McLennan, Q.C., for Plaintiff / Defendant by Counterclaim
Grant Vogeli, for Defendant / Plaintiff by Counterclaim

Subject: Civil Practice and Procedure; Contracts; Evidence; Property

Related Abridgment Classifications

Civil practice and procedure
XXIV Costs
XXIV.7 Particular orders as to costs
XXIV.7.n Miscellaneous

Headnote

Civil practice and procedure --- Costs — Particular orders as to costs — Miscellaneous
Parties bearing own costs — Plaintiff S Ltd. entered into offer with defendant R Corp. to purchase portion of unsubdivided lands — Offer was contingent on R Corp. obtaining subdivision approval and environmental report — R Corp. failed to obtain either within time lines set out in offer and refused to grant extension — S Ltd. brought action against R Corp. for breach of contract; R Corp. brought crossclaim against S Ltd. for wrongful filing of caveat on title to unsubdivided lands — Action and crossclaim dismissed — Parties made submissions regarding costs — Each party to bear own costs — Parties did not conduct litigation in improper manner and solicitor and client costs were not justified — Allegations of breach of good faith terms in agreement were not sufficient reason to award additional costs — Slow production of listing agreement by S Ltd. did not significantly affect litigation — Certain issues raised by R Corp. were merely attempts to reargue matters decided at trial — Trial proceeded in expeditious manner and steps taken in litigation were not unreasonable — Both parties ended in same position and neither side won.

Table of Authorities

Cases considered by *Gerald A. Verville J.*:

Buchanan v. Lamoureux (2011), 2011 ABQB 256, 2011 CarswellAlta 908 (Alta. Q.B.) — referred to

Calgary (City) v. Alberta (Minister of Municipal Affairs) (2008), 2008 ABQB 433, 2008 CarswellAlta 939 (Alta. Q.B.) — referred to

College of Physicians & Surgeons (Alberta) v. H. (J.) (2009), 468 A.R. 101, [2009] 7 W.W.R. 150, 2009 ABQB 48, 2009 CarswellAlta 137, 3 Alta. L.R. (5th) 333 (Alta. Q.B.) — followed

Conway v. Zinkhofer (2007), 2007 CarswellAlta 7, 2007 ABQB 2 (Alta. Q.B.) — referred to

Cope v. Morton (2004), 2004 BCSC 1726, 2004 CarswellBC 3063 (B.C. S.C.) — referred to

Dwyer v. Fox (1996), 181 A.R. 223, 116 W.A.C. 223, 47 C.P.C. (3d) 342, 1996 CarswellAlta 295 (Alta. C.A.) — referred to

Evans v. Sports Corp. (2011), 2011 ABQB 616, 2011 CarswellAlta 1773 (Alta. Q.B.) — followed

Hamilton v. Open Window Bakery Ltd. (2003), 2004 SCC 9, 316 N.R. 265, 235 D.L.R. (4th) 193, 2003 CarswellOnt 5591, 2003 CarswellOnt 5592, 2004 C.L.L.C. 210-025, 184 O.A.C. 209, [2004] 1 S.C.R. 303, 70 O.R. (3d) 255 (note), 40 B.L.R. (3d) 1 (S.C.C.) — referred to

Jackson v. Trimac Industries Ltd. (1993), 8 Alta. L.R. (3d) 403, 138 A.R. 161, [1993] 4 W.W.R. 670, 1993 CarswellAlta 310 (Alta. Q.B.) — followed

Jackson v. Trimac Industries Ltd. (1994), 1994 CarswellAlta 135, 20 Alta. L.R. (3d) 117, [1994] 8 W.W.R. 237, 155 A.R. 42, 73 W.A.C. 42 (Alta. C.A.) — referred to

Jawanda v. Jawanda (2005), 2005 BCSC 1721, 2005 CarswellBC 2942, [2006] 5 W.W.R. 704 (B.C. S.C.) — referred to

Johnston v. Law Society (Prince Edward Island) (1987), 67 Nfld. & P.E.I.R. 52, 206 A.P.R. 52, 1987 CarswellPEI 51 (P.E.I. C.A.) — referred to

LSI Logic Corp. of Canada Inc. v. Logani (2001), 100 Alta. L.R. (3d) 49, 2001 ABQB 968, 2001 CarswellAlta 1733, [2002] 4 W.W.R. 531 (Alta. Q.B.) — referred to

Mahe v. Boulianne (2010), 81 R.F.L. (6th) 4, 2010 ABCA 74, 2010 CarswellAlta 396, 84 C.P.C. (6th) 263, 21 Alta. L.R. (5th) 277 (Alta. C.A.) — referred to

Medway Oil & Storage Co. v. Continental Contractors Ltd. (1929), [1929] A.C. 88 (U.K. H.L.) — referred to

Phinny v. Macaulay (2009), 2009 CarswellOnt 1648 (Ont. S.C.J.) — followed

Strategy Summit Ltd. v. Remington Development Corp. (2009), 2009 CarswellAlta 67, 2009 ABCA 30, 446 A.R. 312, 442 W.A.C. 312 (Alta. C.A.) — considered

Trizec Equities Ltd. v. Ellis-Don Management Services Ltd. (1999), 251 A.R. 101, 1999 ABQB 801, 1999 CarswellAlta 1469 (Alta. Q.B.) — followed

Waterous Investments Inc. v. Liberton Holdings Ltd. (1996), 183 A.R. 229, 1996 CarswellAlta 303 (Alta. Q.B.) — referred to

Statutes considered:

Land Titles Act, R.S.A. 2000, c. L-4
s. 144 — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
R. 10.33 — referred to

Sched. C, Tariff of Costs — referred to

Sched. C, Tariff of Costs, column 5 — referred to

ADDITIONAL REASONS to judgment reported at *Strategy Summit Ltd. v. Remington Development Corp.* (2011), 2011 ABQB 549, 2011 CarswellAlta 1616, 52 Alta. L.R. (5th) 155 (Alta. Q.B.), respecting costs.

***Gerald A. Verville J.*:**

Introduction

1 In May 2005, Strategy Summit Ltd. ("Strategy") offered to purchase from Remington Development Corporation ("Remington") a portion of unsubdivided land. Strategy paid a $25,000 deposit upon acceptance of the offer. The offer was contingent upon Remington obtaining subdivision approval and a phase III environmental report. Remington failed to obtain either within the time contemplated in the offer and refused in December 2005 to grant an extension.

2 Strategy registered a caveat on the title to the unsubdivided lands and claimed specific performance or in the alternative damages. Remington asserted that the caveat prevented it from developing, selling, financing or otherwise dealing with the lands and claimed resulting damages by way of counterclaim.

3 Following the trial of this action I issued Reasons for Judgment (*Strategy Summit Ltd. v. Remington Development Corp.*, 2011 ABQB 549 (Alta. Q.B.)), dismissing both Strategy's claim against Remington for specific performance or damages and Remington's counterclaim for damages.

4 The parties submitted written arguments with respect to costs and subsequently made oral submissions. Randy Remington, the president of Remington, and Brad Ferguson, the president of Strategy, filed affidavits in support of the costs application. Both provided a draft Schedule C Bill of Costs on Column 5 which were relatively similar in amount.

5 Each side argues that it is entitled to solicitor client costs, or in the alternative substantial party and party costs, because: it was substantially successful in the lawsuit (or at least more successful than the other party), high costs were reasonably incurred, and the other side unsuccessfully alleged bad faith.

Positions of the Parties

6 Remington submits that solicitor client costs, or in the alternative a costs award providing 40% to 50% indemnity or more in the form of a lump sum, are warranted for the following reasons:

1. Strategy maintained its allegation that Remington acted in bad faith until the end of trial;

2. Remington was justified in retaining its usual Calgary counsel although the trial was heard in Edmonton;

3. Strategy attempted to conceal its efforts to flip the lands in question and other information in the possession of its real estate broker, Avison Young;

4. Strategy's failure to produce the listing agreement and other Avison Young documents delayed the litigation;

therefore Remington's reputation has not been adversely affected by the litigation;

11. Remington wanted to win the litigation at any price, and hopes to financially cripple Strategy with a costs award;

12. The Court found that Strategy had a reasonable belief that a caveat may be reasonably filed, that its interpretation of the wording of the offer was not unreasonable and that malice on its part had not been established

13. Strategy took steps to shorten the proceedings and made a reasonable formal offer demonstrating willingness to compromise; Strategy's withdrawal of an admission had no impact of any significance on the trial;

14. Remington raised the issue of the second deposit for the first time at the start of trial; this point was not pled, nor was it the subject of any examination for discovery; at law there was no continuing obligation for Strategy to fulfill its further contractual obligations until a court ordered specific performance;

15. Given that Remington's counterclaim was for more than ten times Strategy's claim, costs should be awarded in favour of Strategy for successfully defending the counterclaim; alternatively, the parties should bear their own costs.

16. Strategy has incurred legal fees and disbursements in advancing its claim and defending the counterclaim in the approximate amount of $665,000.

Factors

8 Under Rule 10.33, when making a costs award, the Court may consider all or any of the following:

(a) the result of the action and the degree of success of each party;

(b) the amount claimed and the amount recovered;

(c) the importance of the issues;

(d) the complexity of the action;

(e) the apportionment of liability;

(f) the conduct of a party that tended to shorten the action;

(g) any other matter related to the question of reasonable and proper costs that the Court considers appropriate.

9 Further, in deciding whether to impose, deny or vary an amount in a costs award, the Court may consider all or any of the following:

(a) the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action;

(b) a party's denial of or refusal to admit anything that should have been admitted;

(c) whether a party started separate actions for claims that should have been filed in one action or whether a party unnecessarily separated that party's defence from that of another party;

(d) whether any application, proceeding or step in an action was unnecessary, improper or a mistake;

(e) an irregularity in a commencement document, pleading, affidavit, notice, prescribed form or document;

(f) a contravention of or non-compliance with these rules or an order;

(g) whether a party has engaged in misconduct.

10 The parties cite a number of authorities which provide guidance as to when solicitor and client costs should be awarded, what matters should be considered when there is a counterclaim, and when Schedule C Costs should be increased, including: *Mahe v. Boulianne*, 2010 ABCA 74 (Alta. C.A.) at para 6, *Phinny v. Macaulay*, 2009 CanLII 13614 [2009 CarswellOnt 1648 (Ont. S.C.J.)] at paras 19 and 21, *Evans v. Sports Corp.*, 2011 ABQB 616 (Alta. Q.B.), *Cope v. Morton*, 2004 BCSC 1726 (B.C. S.C.), paras 9-11 and *Jawanda v. Jawanda*, 2005 BCSC 1721 (B.C. S.C.) at paras 22 and 23; *Conway v. Zinkhofer*, 2007 ABQB 2 (Alta. Q.B.), *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9, [2004] 1 S.C.R. 303 (S.C.C.), *Buchanan v. Lamoureux*, 2011 ABQB 256 (Alta. Q.B.), *Trizec Equities Ltd. v. Ellis-Don Management Services Ltd.*, 1999 ABQB 801 (Alta. Q.B.), *LSI Logic Corp. of Canada Inc. v. Logani*, 2001 ABQB 968 (Alta. Q.B.), *Calgary (City) v. Alberta (Minister of Municipal Affairs)*, 2008 ABQB 433 (Alta. Q.B.), M Orkin, *The Law of Costs*, 2d ed (Aurora, Ont.: Canada Law Book, 1987-), *Dwyer v. Fox* (1996), 181 A.R. 223 (Alta. C.A.), *Johnston v. Law Society (Prince Edward Island)* (1987), 206 A.P.R. 52 (P.E.I. C.A.), *Waterous Investments Inc. v. Liberton Holdings Ltd.* (1996), 183 A.R. 229 (Alta. Q.B.), *Jackson v. Trimac Industries Ltd.* (1993), 138 A.R. 161, 8 Alta. L.R. (3d) 403 (Alta. Q.B.) at paras 28-37, costs orders affirmed (1994), 155 A.R. 42, 20 Alta. L.R. (3d) 117 (Alta. C.A.), and *Medway Oil & Storage Co. v. Continental Contractors Ltd.*, [1929] A.C. 88 (U.K. H.L.). I have also reviewed *College of Physicians & Surgeons (Alberta) v. H. (J.)*, 2009 ABQB 48 (Alta. Q.B.).

11 I should mention that none of these cases is on all fours with the facts in this case and some only provide guidance on a particular point. Further, some are more relevant than others regarding the issue of costs. Finally, I am mindful that this Court has considerable discretion when awarding costs.

Solicitor-Client/Solicitor and his own Client Costs

12 Graesser J in *College of Physicians & Surgeons (Alberta) v. H. (J.)* at paras 4-23, (2009), 468 A.R. 101 (Alta. Q.B.) summarized some of the factors which militate in favour of a court exercising its discretion to award solicitor-client costs due to party misconduct:

- the conduct of a party has been reprehensible, scandalous or outrageous
- the conduct occurred during the course of the litigation
- solicitor and client costs might suffice to satisfy the objectives of deterrence and punishment that would otherwise be served by a punitive damage award
- the case is rare and exceptional or unusual
- allegations of morally reprehensible conduct by such party are held to be groundless by the trier of fact
- there was no reasonable basis on which to commence, or continue, litigation.

13 In *Jackson v. Trimac Industries Ltd.*, Hutchinson J set out the rare and exceptional circumstances which might justify solicitor and his own client costs:

- circumstances constituting blameworthiness in the conduct of the litigation by that party;
- cases in which justice can only be done by a complete indemnification for costs;
- where there is evidence that the plaintiff did something to hinder, delay or confuse the litigation, where there was no serious issue of fact or law which required these lengthy, expensive proceedings, where the positively misconducting party was "contemptuous" of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his;
- an attempt to deceive the court and defeat justice, an attempt to delay, deceive and defeat justice, a requirement imposed on the plaintiff to prove facts that should have been admitted, thus prolonging the trial, unnecessary adjournments, concealing material documents from the plaintiffs and failing to produce material documents in a timely fashion;
- where the defendants were guilty of positive misconduct, where others should be deterred from like conduct and the defendants should be penalized beyond the ordinary order of costs;
- defendants found to be acting fraudulently and in breach of trust;
- the defendants' fraudulent conduct in inducing a breach of contract and in presenting a deceptive statement of accounts to the court at trial;
- fraudulent conduct;
- an attempt to delay or hinder proceedings, an attempt to deceive or defeat justice, fraud or untrue or scandalous

25 I find taking into consideration the nature of this lawsuit, that Strategy's conduct does not fall within the rare and exceptional case where solicitor and client costs are warranted. I therefore dismiss Remington's application for solicitor-client costs.

Against Remington

26 Although Remington may have taken a hard nosed approach in this action, I am not satisfied that it did anything which could be categorized as circumstances constituting blameworthiness in the conduct of the litigation. Further, I am not satisfied that there were any other circumstances where there was conduct by Remington which would warrant solicitor and client costs.

27 In my view, the trial itself proceeded in an expeditious fashion and was shortened by perhaps a few days when Remington decided it was unnecessary to call two witnesses it initially indicated it would call. Strategy unsuccessfully submitted in argument that an adverse inference should be drawn against Remington for failing to call these witnesses (Paras 140-146, Reasons for Judgment).

28 In the circumstances of this case, I find that Strategy is not entitled to solicitor-client costs.

Increased Schedule C Costs

29 In *Trizec Equities*, Mason J. considered factors relevant to an increase in costs, including the following:

• the time for preparing and organizing documents for the purposes of production;
• the preparation time required in relation to examinations for discovery;
• the utilization of technology and computers to prepare immediate court records;
• the inordinate efforts involved in collating testimony and thousands of pages of exhibit documents in order to prepare written submissions following trial;
• the fact that these trials consume counsels' time for many months to the exclusion of any other work
• given the magnitude of the damages sought some defendants without the benefit of adequate insurance coverage had little choice but to defend against the claims, a task which, by itself, had the potential to bankrupt both parties.

30 Strategy in its Amended Statement of Claim sought *inter alia* an order declaring that its caveat was validly registered against the lands, specific performance or in the alternative judgment in an amount not less than $2,500,000. Remington in its Amended Amended Statement of Defence and Counterclaim sought damages in excess of $25,000,000, asserting that Strategy committed slander of title by filing the caveat. Randy Remington testified at the trial that Remington made a profit of $22,000,000 when it developed adjacent lands referred to as the Eastern Block and sold the development to a pension fund (Para. 67). This testimony was supported by that of a chartered account and chartered business valuator who gave expert testimony on behalf of Remington.

31 The trial, absent oral argument, took 25 half days. Three ordinary witnesses were called on behalf of Strategy and five on behalf of Remington. In addition each party called three expert witnesses.

32 This was an "electronic" trial in that almost five hundred documents some of which consisted of numerous pages were listed on an XL spread sheet. A significant number of these documents were referred to during the course of the trial. The spread sheet gave each document a number, identified the type of document, the title of the document, the author and the recipient. Simply clicking on the document number on the spread sheet produced the document in PDF on a number of screens. A program was available for the convenience of the Court which permitted notes or highlighting to be made on these documents while in electronic PDF form solely on my screen as well as for them to be copied into WordPerfect. This elaborate undertaking was undertaken by counsel for Strategy with the full cooperation of counsel for Remington.

33 In my view the trial proceeded in an expeditious manner. Prior steps taken in the litigation including proceeding to the Court of Appeal were not unreasonable. The stakes were high.

34 There was evidence of some effort on the part of Strategy to settle prior to trial, and what I would characterize as a half-hearted offer by Remington at the 11th hour to allow both parties to walk away from the litigation.

35 In the end result both parties were left in the same position they were in prior to engaging in the litigation, except that they had both expended significant amounts in legal and related fees. Strategy's claim for specific performance or alternatively damages was dismissed as was Remington's much larger counterclaim for damages. In the end both parties lost. I agree with the submission of counsel for Strategy that the counterclaim which was roughly ten times the amount of the Strategy damages claim considerably increased the stakes (*Phinny supra*). Although dismissed, it was a serious claim.

36 While this was a case where after taking into consideration some of the factors referred to in *Trizec*, a winner might have been entitled to a costs award providing 40% to 50% indemnity or more in the form of a lump sum, it is my view that there was no winner. In the circumstances of this case, I find that each party should bear their own costs.

Summary of Conclusions

37 I find that:

1. The applications of the parties for solicitor and client costs are dismissed as are the applications for increased party and party costs.

2. Each party should bear its own costs.

Order accordingly.

TAB 5

2016 ABCA 144
Alberta Court of Appeal

Stewart Estate v. 1088294 Alberta Ltd.

2016 CarswellAlta 820, 2016 ABCA 144, [2016] 9 W.W.R. 230, [2016] A.W.L.D. 1956, [2016] A.W.L.D. 1957, [2016] A.W.L.D. 1991, [2016] A.W.L.D. 1998, [2016] A.W.L.D. 1999, [2016] A.W.L.D. 2000, [2016] A.W.L.D. 2001, [2016] A.W.L.D. 2002, [2016] A.J. No. 454, 266 A.C.W.S. (3d) 309, 35 Alta. L.R. (6th) 1

Lynda Calder in her capacity as Executrix of the Estate of Merville V. Stewart (Deceased), Lynda Calder, Morgan Stewart, Cody Stewart, Cody Stewart in her capacity as Administrator or Litigation Representative for the Estate of James D. Stewart (Deceased) and as Litigation Representative for Morgan Stewart, Jerome Development Limited, Bowen Family Properties Ltd., Ronald B. Pole, Kevin R. Pole, Danny G. Oneil in his capacity as Executor of the Estate of Mabel B. Oneil (Deceased), Robert Copley, Karen Nell Copley, Margaret Alice Demers, Mary Jean Biggar, Goldie Alberta Danielsen, Edna Keam, Wilma Marshall and Laurel Lee McLaren, Appellants Not Parties to the Cross-Appeal of Coastal Resources Ltd. Not Parties to the Cross-Appeal of Nexen Inc. and ExxonMobil Canada Ltd. (Plaintiffs) and 1088294 Alberta Ltd., Appellant Cross-Respondent to the Cross-Appeal of Coastal Resources Ltd. Cross-Respondent to the Cross-Appeal of Nexen Inc. and ExxonMobil Canada Ltd. (Plaintiff/ Defendant by Counterclaim) and J. Timothy Bowes, Appellant Not a Party to the Cross-Appeal of Coastal Resources Ltd. Cross-Respondent to the Cross-Appeal of Nexen Inc. and ExxonMobil Canada Ltd. (Defendant by Counterclaim) and TAQA North Ltd., Esprit Exploration Ltd., Bonavista Energy Corporation, and Triquest Energy Corp., Respondents Not Parties to the Cross-Appeal of Coastal Resources Ltd. Not Parties to the Cross-Appeal of Nexen Inc. and ExxonMobil Canada Ltd. (Defendants) and Coastal Resources Limited, Respondent/Cross-Appellant Not a Party to the Cross-Appeal of Nexen Inc. and ExxonMobil Canada Ltd. (Defendant/Plaintiff by Counterclaim) and Nexen Inc. and ExxonMobil Canada Ltd., Respondents/Cross-Appellants Not a Party to the Cross-Appeal of Coastal Resources Ltd. (Defendants/Plaintiffs by Counterclaim)

Patricia Rowbotham, J.D. Bruce McDonald, Brian O'Ferrall JJ.A.

Judgment: May 6, 2016
Docket: Calgary Appeal 1301-0360-AC

Proceedings: additional reasons to *Stewart Estate v. 1088294 Alberta Ltd.* (2015), 653 W.A.C. 201, 607 A.R. 201, [2016] 4 W.W.R. 20, [2015] A.J. No. 1227, 25 Alta. L.R. (6th) 1, 2015 CarswellAlta 2110, 2015 ABCA 357, Brian O'Ferrall J.A., J.D. Bruce McDonald J.A., Patricia Rowbotham J.A. (Alta. C.A.); additional reasons at *Stewart Estate v. 1088294 Alberta Ltd.* (2016), 2016 CarswellAlta 819, 2016 ABCA 143, Brian O'Ferrall J.A., J.D. Bruce McDonald J.A., Patricia Rowbotham J.A. (Alta. C.A.); reversing in part *Stewart Estate v. TAQA North Ltd.* (2013), 576 A.R. 57, 92 Alta. L.R. (5th) 141, 2013 ABQB 691, 2013 CarswellAlta 2414, B.E. Romaine J. (Alta. Q.B.)

Counsel: P.T. Linder, Q.C., S.B.G. Matthews, for Appellants and Appellants / Cross-Respondents
A.D. Grosse, for Respondent, Esprit Exploration Ltd. (now Pengrowth Energy Corporation)

R.C. Steele, for Respondent, Bonavista Energy Corporation
C.A. Crang, for Respondent / Cross-Appellant, Coastal Resources Limited
R.F. Steele, P.G. Chiswell, for Respondents / Cross-Appellants, Nexen Inc. and ExxonMobil Canada Ltd.

Subject: Civil Practice and Procedure; Contracts; Natural Resources; Property; Torts

Related Abridgment Classifications

Civil practice and procedure
XXIV Costs
XXIV.2 Jurisdiction and discretion as to costs

Civil practice and procedure
XXIV Costs
XXIV.4 Offers to settle or payment into court
XXIV.4.a Offers to settle
XXIV.4.a.iii Failure to accept offer
XXIV.4.a.iii.B Multiple plaintiffs or defendants

Civil practice and procedure
XXIV Costs
XXIV.5 Persons entitled to or liable for costs
XXIV.5.a Multiple parties
XXIV.5.a.iv Miscellaneous

Civil practice and procedure
XXIV Costs
XXIV.6 Effect of success of proceedings
XXIV.6.e Miscellaneous

Civil practice and procedure
XXIV Costs
XXIV.11 Costs where counterclaim set up
XXIV.11.a Principles in awarding costs

Headnote

Civil practice and procedure --- Costs — Jurisdiction and discretion as to costs
Plaintiff lessors and parties to whom lessors top-leased hydrocarbon rights were successful in appeal and in having defendants' cross-appeal dismissed — Plaintiffs and B, defendant by counterclaim, claimed costs and disbursements in amount of $2,261,358.08 including trial and appeal costs — Defendant lessees submitted that each party should be responsible for its own appeal costs and that court should exercise discretion and award no costs on appeal because lawsuit was leading case in oil and gas law — On submissions for costs, issues arose as to whether court should determine trial costs or remit them back to trial judge for determination, and factors governing costs award of litigation — It would be less costly and more expeditious for all parties if present court determined trial costs — If matter of costs were remitted to trial judge, her decision might be appealed with leave and present court could be called upon to assess trial costs in any event — Plaintiffs were successful on appeal and factors that would militate against costs did not arise on appeal or at trial — Little weight was given to parties' post-trial costs justifications as they were contradictory, in that plaintiffs argued in costs submissions to trial judge that defendants were only entitled to modest costs, and that after defendants' success at trial they sought significant costs but now only contended that modest or no costs award was appropriate — On consideration of factors in Rule 10.33 of Alberta Rules of Court, especially complexity of trial and of appeal, two time multiplier was awarded — Factors cited by plaintiffs as justifying lump sums were same factors considered and applied to award two times multiplier.

Civil practice and procedure --- Costs — Costs where counterclaim set up — Principles in awarding costs
Plaintiff lessors and parties to whom lessors top-leased hydrocarbon rights were successful in appeal and in having defendants' cross-appeal dismissed — Plaintiffs and B, defendant by counterclaim, claimed costs and disbursements in amount of $2,261,358.08 including trial and appeal costs — Defendant lessees submitted that each party should be responsible for its own appeal costs and that court should exercise discretion and award no costs on appeal because lawsuit was leading case in oil and gas law — On submissions for costs, B claimed separate set of trial costs doubled from date of formal offer, December 29, 2011 — B did not seek multiplier or appeal costs — B was instrumental in lessors' signing top leases but was not party to proceedings until he was made party by counterclaim of defendants N Inc. and E Ltd. — Counterclaim sought damages of minimum $600,000 from B and from numbered company — N Inc. and E Ltd. should be solely responsible for these costs, and $181,650 claimed by B to defend counterclaim was excessive — Issue raised by counterclaim, champerty, required preparation which was not entirely subsumed in preparation of main case — B's personal exposure was $600,000 — B was entitled to costs in lump sum amount of $50,000 for trial preparation and for trial for which N Inc. and E Ltd. were jointly and severally liable — Trial costs were doubled on basis of time of formal offer made before trial, on December 29, 2011 — There was no reason to deny plaintiffs, including B, costs consequences of besting their offer.

Civil practice and procedure --- Costs — Effect of success of proceedings — Miscellaneous
Plaintiff lessors and parties to whom lessors top-leased hydrocarbon rights were successful in appeal and in having defendants' cross-appeal dismissed — Plaintiffs and B, defendant by counterclaim, claimed costs and disbursements in amount of $2,261,358.08 including trial and appeal costs — Liability of defendant EE Ltd. was found to differ from that of other defendants, and entire court held that EE Ltd. was not jointly and severally liable with working interest owners — On submission for costs, EE Ltd. argued that this meant that plaintiffs were wholly unsuccessful in their claim against EE Ltd. and therefore no appeal costs should be awarded against it — Although EE Ltd. was not found liable for value of all natural gas wrongfully produced from relevant well, it was found liable for overriding royalties it received — EE Ltd. resisted claim for disgorgement of overriding royalties — Plaintiffs were not wholly unsuccessful in claim against EE Ltd. — EE Ltd.'s situation was different from those of other defendants in that it was merely recipient of portion of value of natural gas wrongfully produced by working-interest owners — Its liability lay in law of personal property and not in tort — Liability of EE Ltd. for costs was determined to be $45,000 for trial costs and $5,000 for appeal costs — Assessment reflected reduction in cost that may otherwise have been ordered for fact that EE Ltd. was successful in arguing that it was not jointly and severally liable for wrongful production by working-interest owners — As consequence, EE Ltd.'s liability for costs was to be deducted from total amount of costs awarded — Trial costs were doubled from time of formal offer made by plaintiffs prior to commencement of trial — Plaintiffs made two informal offers before appeal was heard, and those offers were bested — Doubling of costs of appeal hearing was allowed — EE Ltd. was solely liable for recoverable Schedule C fees in amount of $100,000.

Civil practice and procedure --- Costs — Offers to settle or payment into court — Offers to settle — Failure to accept offer — Multiple plaintiffs or defendants
Plaintiff lessors and parties to whom lessors top-leased hydrocarbon rights were successful in appeal and in having defendants' cross-appeal dismissed — Prior to January 11, 2012 commencement date of trial, plaintiffs made informal offer of $10.5 million followed with formal offer of $18 million in December 29, 2011 — Informal offers which followed were not specific but reference was made to "defendants" so one could reasonably infer that this encompassed all defendants — Plaintiffs' formal offer of December 29, 2011 specified that it was made to defendants and plaintiffs by counterclaim which at time were T Ltd., N Inc., E Ltd., EE Ltd., B Corp., T Corp. and C Ltd. — Before hearing of appeal, plaintiffs made two informal offers of $2.957 million in July 2014 and $5.525 million in August 2014 — Pre-appeal offers were bested — In costs submissions, B Corp. and C Ltd. argued that despite offers of settlement they were compelled to continue producing because they owed duty to lessors who had not told them to vacate and who were not parties to litigation — B Corp. and C. Ltd. further argued that fact that they were compelled to defend leases in absence of notice to vacate by putative lessors ought to be factor in reducing or eliminating costs award against them — B Corp. and C Ltd. misunderstood effect of pooling which was required in order to constitute legal production spacing unit — None of lessees had right to produce as soon as any one of lessors withdrew consent to continued production — If one lease in pooled production spacing unit is terminated, remaining leases do not necessarily terminate, but production must cease — If B Corp. had ceased production, its lessors could have no complaint — Leaving lessors' molecules in ground is not actionable — Producing molecules which one has no right to produce triggers obligation to account to owner for that production — There was no reason to deny plaintiffs, including B, who was defendant to original action by counterclaim, costs consequences of besting offer and trial costs from time of formal offer of December 29, 2011 were doubled — Informal offers made before appeals were heard were conditional but there was every indication that acceptance by defendants would have led to approval by all plaintiffs — Such

offers were sincere attempts to settle dispute without need for lengthy appeal hearing and doubling of costs of appeal hearing was allowed.

Civil practice and procedure --- Costs — Persons entitled to or liable for costs — Multiple parties — Miscellaneous
Plaintiff lessors and parties to whom lessors top-leased hydrocarbon rights were successful in appeal and in having defendants' cross-appeal dismissed — Plaintiffs and B, defendant by counterclaim, claimed costs and disbursements in amount of $2,261,358.08 including trial and appeal costs — Defendant lessees submitted that each party should be responsible for its own appeal costs and that court should exercise discretion and award no costs on appeal because lawsuit was leading case in oil and gas law — Liability of defendant EE Ltd. was found to differ from that of other defendants, and entire court held that EE Ltd. was not jointly and severally liable with working interest owners — EE Ltd.'s situation was different from those of other defendants in that it was merely recipient of portion of value of natural gas wrongfully produced by working-interest owners — Liability of EE Ltd. for costs was determined to be $45,000 for trial costs and $5,000 for appeal costs — EE Ltd.'s liability for costs was to be deducted from total amount of costs awarded — Defendants, other than EE Ltd., were jointly and severally liable for damages — There was no principled basis on which to make liability for costs any different — It was open to defendants to determine among themselves portion of costs for which each was responsible, but this ought not to be plaintiffs' responsibility — After deducting EE Ltd. amounts, remaining defendants were jointly and severally liable for balance — Plaintiffs were entitled to recoverable Schedule C fees in amount of $783,000 from defendant-lessees and EE Ltd. — B was entitled to recoverable Schedule C fees costs in amount of $100,000 from defendants N Inc. and E Ltd. — Liability for recoverable Schedule C fees was in amount of $100,000 against EE Ltd. solely, $683,000 against B Corp. jointly and severally with other defendants, $683,000 against C Ltd. jointly and severally with other defendants, $683,000 against N Inc. and E Ltd. jointly and severally with other defendants, and $100,000 against N Inc. and E Ltd. jointly and severally against each other — Assessment officer was to assess disbursements sought to be recovered by plaintiffs in accordance with rules governing assessment of such costs.

Table of Authorities

Cases considered:

Delta Hotels Ltd. v. Okabe Canada Investments Co. (1992), 3 Alta. L.R. (3d) 85, 131 A.R. 118, 25 W.A.C. 118, 1992 CarswellAlta 75, 1992 ABCA 176 (Alta. C.A.) — referred to

Freyberg v. Fletcher Challenge Oil & Gas Inc. (2006), 2006 ABCA 260, 2006 CarswellAlta 1238, 397 A.R. 235, 384 W.A.C. 235 (Alta. C.A.) — considered

Globex Foreign Exchange Corp. v. Kelcher (2011), 2011 ABCA 240, 2011 CarswellAlta 1356, 2011 C.L.L.C. 210-043, 93 C.C.E.L. (3d) 239, 337 D.L.R. (4th) 207, 48 Alta. L.R. (5th) 215, [2012] 1 W.W.R. 17, 513 A.R. 101, 530 W.A.C. 101 (Alta. C.A.) — referred to

Hill v. Hill (2013), 2013 ABCA 313, 2013 CarswellAlta 1785, (sub nom. *Hill v. Hill Family Trust)* 561 A.R. 50, (sub nom. *Hill v. Hill Family Trust)* 594 W.A.C. 50, 3 Alta. L.R. (6th) 302 (Alta. C.A.) — considered

Hogarth v. Rocky Mountain Slate Inc. (2013), 2013 ABCA 116, 2013 CarswellAlta 835, [2013] 12 W.W.R. 732, 87 Alta. L.R. (5th) 108 (Alta. C.A.) — considered

Mahe v. Boulianne (2010), 2010 ABCA 74, 2010 CarswellAlta 396, 21 Alta. L.R. (5th) 277, 84 C.P.C. (6th) 263, 81 R.F.L. (6th) 4 (Alta. C.A.) — considered

Nexxtep Resources Ltd. v. Talisman Energy Inc. (2012), 2012 ABQB 708, 2012 CarswellAlta 2089, [2013] 5 W.W.R. 832, 77 Alta. L.R. (5th) 16 (Alta. Q.B.) — considered

RVB Managements Ltd. v. Rocky Mountain House (Town) (2015), 2015 ABCA 304, 2015 CarswellAlta 1771 (Alta. C.A.) — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
R. 4.24 — referred to

R. 10.31 — considered

R. 10.31(1)(b)(i) — considered

R. 10.33 — considered

Tariffs considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Sched. C, Tariff of Costs, column 4 — referred to

Sched. C, Tariff of Costs, column 5 — referred to

ADDITIONAL REASONS to judgment reported at *Stewart Estate v. 1088294 Alberta Ltd.* (2015), 2015 ABCA 357, 2015 CarswellAlta 2110, 25 Alta. L.R. (6th) 1, [2015] A.J. No. 1227, [2016] 4 W.W.R. 20, 607 A.R. 201, 653 W.A.C. 201 (Alta. C.A.), regarding costs.

***Per curiam*:**

I. Overview

1 In our reasons for judgment reported as *Stewart Estate v. 1088294 Alberta Ltd.*, 2015 ABCA 357 (Alta. C.A.) we invited the parties to make written submissions on costs if they were unable to agree. We have considered those submissions and our conclusions follow.

2 By way of introduction, the appellants (lessors and parties to whom the lessors "top-leased" their hydrocarbon rights) were successful in their appeal and in having the respondents' cross-appeal dismissed. The appellants and the cross-respondent, J. Timothy Bowes, claim costs and disbursements of $2,261,358.08, which includes trial and appeal costs. In brief, the appellants support their claim as follows: their unqualified success on appeal and cross-appeal; they were compelled to sue because of the respondents' tortious conduct and the litigation is ten years and counting; the suit was complex and they were pursuing five respondents each with a different approach to defending the claims against them at trial and on the appeal; the respondents' proposed bill of costs for the trial alone was 50% more than the appellants' claim for trial and appeal; the appellants bested a formal offer of $18 million made before trial; and there were three informal offers, two before the appeal, all of which were bested. The appellants request that we determine trial costs.

3 The respondent-lessees contend that each party should be responsible for its own appeal costs given what they characterized as novel issues, and trial costs should be remitted back to the trial judge for determination. More specifically, the respondents contend that this court should exercise its discretion and award no costs on appeal because the lawsuit is a "leading case in oil and gas law" as it addressed important industry-wide issues for the benefit of oil industry participants and freeholder interest holders. In the alternative, a much reduced award is appropriate. They contend that the following consideration militates against the respondents paying the appellants' costs: the lessors would be over-indemnified because they were never responsible for costs as a result of an agreement with a non-party (the top lessee) and a retainer agreement with their counsel. The respondents contend that trial costs are on reserve by the trial judge and should be decided by her (not by this court). They say the appellants pursued unmeritorious collateral issues at trial and used objectionable expert witness tactics. Coastal Resources Limited and Bonavista Energy Corporation submit that they are both in a unique position because of the time when they were added as parties and the fact that their legal relationship was arguably with a non-party (Snell Farms Ltd. and Wheatland Farming Company Ltd.). Esprit Exploration Ltd. also distinguishes itself from the other respondents because its liability (disgorgement of gross royalties) is arguably of a different nature.

4 A Consent Order of this court on April 9, 2014 directed that TAQA North Ltd. would have no monetary liability to the appellants, including liability for costs incurred prior to April 9, 2014 or from the appeal.

II. Analysis

5 This section addresses whether this court should determine trial costs or remit them back to the trial judge for determination; what factors govern the award of costs in this litigation; whether Bowes is entitled to costs and, if so, in what amount; whether Esprit's special circumstances warrant different costs; the effect of the informal and formal offer made before trial and the informal offers made thereafter; and whether the respondents (other than Esprit) should be held jointly and severally liable or liable pro rata commensurate with damages.

A. Should this Court determine trial costs or remit them back to the trial judge for determination?

6 Written submissions about trial costs were made to the trial judge and her costs decision is reserved.

7 The appellants submit that because the issues before the trial judge were the same as those before this court, we are in a position to award trial costs and doing so would be timely and cost-effective.

8 Bonavista Energy Corporation contends that the trial costs should be determined by the trial judge since there are unique aspects of the trial that the trial judge is best positioned to quantify. Nexen Inc. and ExxonMobil Canada Ltd. take the same position and say the trial judge is uniquely positioned to decide trial costs, she is seized and her decision is reserved. They make specific claims about the appellants' trial conduct which they contend warrant special consideration. Coastal also submits the trial judge should decide trial costs but in the event this court determines costs, it argues that "grossly excessive costs" are being claimed.

9 This court has determined trial costs in the past when the appellant was successful on appeal. The appellants cited *Hogarth v. Rocky Mountain Slate Inc.*, 2013 ABCA 116 (Alta. C.A.) at paras 5-6, 87 Alta LR (5th) 108 as an example, although the issue of the appropriateness of this court setting trial costs when the trial judge had already embarked on a process for setting the same was not discussed in that case. The respondents' authorities cited for the proposition that we ought to remit the issue of trial costs to the trial judge are also distinguishable because in both cases cited the appeal was dismissed: *Delta Hotels Ltd. v. Okabe Canada Investments Co.*, 1992 ABCA 176, 3 Alta. L.R. (3d) 85 (Alta. C.A.) and *Globex Foreign Exchange Corp. v. Kelcher*, 2011 ABCA 240, 48 Alta. L.R. (5th) 215 (Alta. C.A.).

10 We conclude that it will be less costly and more expeditious for all parties if this court determines trial costs. If we were to remit the matter of costs to the trial judge, her decision might be appealed (with leave) and this court could be called upon to assess trial costs in any event.

B. What factors govern the award of costs in this litigation?

11 As noted above, the respondents' position is that each party should bear its own costs. We reject that position: the appellants were successful on appeal and the factors that would militate against costs do not arise on this appeal nor, in our view, did they arise at trial.

12 That leaves the question of whether we should exercise our discretion to award enhanced costs, i.e., costs above the tariffs prescribed by Column 5.

1. Costs Submissions Made After Trial

13 The appellants justify their position in part because they seek "costs on the same multiplier, and for the same items, and with the same lump sum components" as the respondents sought after trial. However, reliance on the trial submissions is a double-edged sword: the appellants strenuously argued in their submissions to the trial judge that the respondents were only entitled to very modest costs. They emphasized in those submissions that the proceedings "were efficient and in the best tradition of the adversarial process" and noted the "extensive cooperation between counsel that enabled ... efficiency" at trial

and in pre-trial proceedings. They said "it was a testament to the cooperation and efforts of counsel on both sides" that the trial was expeditious and "this efficiency ... should be reflected in a lower costs assessment" against them.

14 The respondents' arguments about costs are similarly contradictory: after their success at trial they sought significant costs but now they contend only a modest award or no costs are appropriate. The respondents attempt to distinguish their previous position on the basis that no such award was granted and there were other factors that led to those submissions.

15 Given these contradictions, we give little weight to the parties' post-trial justifications for costs.

2. Multiplier of Column 5 Tariffs

16 Costs are governed by Schedule C: Tariff of Recoverable Fees, *Alberta Rules of Court*, Alta Reg 124/2010. The quantum of damages claimed exceeds $1.5 million therefore Column 5 applies.

17 Rule 10.33 of the *Rules* provides a list of factors a court may consider when determining costs. They include the degree of success, the amount claimed and recovered, the importance of the issues, the complexity of the action, and conduct that shortened proceedings. Costs may be denied when conduct unnecessarily lengthened proceedings or there was misconduct. After considering the foregoing factors, reasonable and proper costs may be awarded in "any amount that the court considers to be appropriate in the circumstances" including full indemnity or lump sums: Rule 10.31.

18 On the issue of trial costs, the appellants submit that the action's complexity (volume of documents, days of questioning, agreed exhibits, number of lay and expert witnesses and volume of written arguments) support a four times multiplier of the tariff amounts in Column 5. The respondents argue that no multiplier should be used.

19 Factors cited by the appellants to support the four times multiplier to the tariffed items for the appeal are that they were responding to five counsels' submissions on behalf of five respondents, the issues were complex and varied, the appeal hearing was two days in length and they achieved success on virtually all the grounds of appeal.

20 Bonavista favours no costs or a reduced award because of the novel nature of the issues. It submits the court should not encourage parties "such as these Plaintiffs" (presumably referring to the top lessees) to "interfere with long standing commercial relationships". In any event, they say at most tariffed Column 5 costs are appropriate because "all" multiples cases "involve egregious conduct on the part of the unsuccessful party, which conduct is absent". That is an overstatement as the cases set out in Appendix 1 demonstrate.

21 Bonavista objects to the "sweeping" nature of the appellants' submissions. It notes that some of the appellants' justification for enhanced costs is based on allegations that do not apply to Bonavista since it acquired its assets in January 2004 and Bonavista knew nothing about the well's history. By then the 7-25 well had resumed production and Bonavista believed it had contractual royalty obligations to Snell/Wheatland, and paid more than $1.5 million in royalties from 2001 to 2011 on the basis of this belief. Among other things, this respondent also notes that it did not receive a Notice to Vacate and was first served in 2006. Similar submissions are made by Coastal.

22 The record does not support Bonavista's submissions. In January 2004 Bonavista acquired all of the shares of Triquest Energy Corp. It was Triquest which had served the independent operations notice on Nexen, the operator of the 7-25 well. This initiated the wrongful production at issue in this case. When Bonavista acquired Triquest, it would be deemed to have acquired Triquest's knowledge. Prior to its acquisition of Triquest in 2004, Triquest's files would have revealed that the 7-25 well had not been produced in years and that it was Triquest which took action to get the well back on production. There is no merit to Bonavista's submission that it knew nothing about the well's history. The company it acquired knew the history only too well. Likewise, the record does not support Coastal's submissions. Coastal's predecessor-in-title, Unocal, was served with the Notice to Vacate in the Fall of 2005 because Coastal had failed to register its interest on title and Coastal was advised of the litigation in December of 2005.

23 Nexen and ExxonMobil raise the issue of the lessors' indemnification by the top lessee and argue that since the lessors incurred no liability for costs, any award would be a windfall and contrary to the purpose of a costs award, namely partial indemnification of costs actually incurred. Although their primary submission is that any award over-indemnifies the

appellants, if this court is not persuaded of that, Nexen and ExxonMobil argue that the most that should be awarded is a lump sum of $70,000, about two times Column 5, the same scale this court awarded in *Freyberg v. Fletcher Challenge Oil & Gas Inc.*, 2006 ABCA 260 (Alta. C.A.), 3 Alta. L.R. (6th) 302. We question Nexen and ExxonMobil's suggestion that $70,000 in costs would be roughly two times Column 5. We would have estimated two times Column 5 as being more like $200,000.

24 Application of a multiplier is not unprecedented when the trial is long and complex and the quantum of damages claimed is significantly greater than $1.5 million: *Nexxtep Resources Ltd. v. Talisman Energy Inc.*, 2012 ABQB 708 (Alta. Q.B.) at para 24, (2012), 77 Alta. L.R. (5th) 16 (Alta. Q.B.) (three times Column 5 and no misconduct); *Hill v. Hill*, 2013 ABCA 313 (Alta. C.A.) at paras 39-40, (2013), 561 A.R. 50 (Alta. C.A.) (four and five times Column 5 for incessant misconduct).

25 An appendix of cases that have discussed multipliers is attached. To summarize, Alberta courts have typically awarded a multiplier of the tariffs in Column 5 in three circumstances: when the complexity of the action warrants it, when the amount in dispute significantly exceeds the $1.5 million threshold for Column 5 or when the conduct of one of the parties warranted a multiplier. However, generally, courts also rely upon the other considerations set out in Rule 10.33 in determining whether a multiplier should be applied. There is nothing in the cases surveyed to suggest that the analysis for applying a multiplier differs in an oil and gas context.

26 Since a costs award is ultimately at the discretion of the judge, there is little in the way of a uniform basis upon which a multiplier is awarded or declined. It is highly dependent on the unique facts and circumstances of each case. However, a general principle arising from the case law is that the discretion to grant costs must be exercised judicially, and in line with the factors in Rule 10.33. Additionally, in actions where the amount in dispute greatly exceeds Column 5, there is a general recognition that Schedule C is deficient, and that a multiplier may be applied. However, courts are careful to avoid awarding a multiplier that would result in the over-indemnification of a successful party.

27 The leading oil and gas case from this court is *Freyberg*. The appellant sought a declaration that a freehold petroleum and natural gas lease had terminated, as well as an accounting of the proceeds of production from that well. This court awarded a two times multiplier for the trial and the appeal. A two times multiplier when damages were in the range of $25M was also awarded in *RVB Managements Ltd. v. Rocky Mountain House (Town)*, 2015 ABCA 304, 259 A.C.W.S. (3d) 247 (Alta. C.A.). This was an action to recover damages resulting from the diversion of water, which created remediation costs and delays in developing land.

28 Having considered the factors in Rule 10.33, especially the trial's complexity (volume of documents, days of questioning, agreed exhibits, number of lay and expert witnesses and volume of written arguments) and the complexity of the appeal (five respondents, the issues were complex and varied and the appeal hearing was two days in length), we award a two times multiplier.

3. Lump Sums

29 Rule 10.31(1)(b)(i) provides that "a lump sum instead of or in addition to assessed costs" may be ordered. The appellants contend that lumps sums are appropriate for both the trial and the appeal because of the complexity, duration, number of submissions to which they were required to respond and the quantum in issue. They claim lump sums of $100,000 for the trial and $50,000 for the appeal.

30 In our view, the factors cited by the appellants as justifying lump sums are the same factors that we considered and applied to award the two times multiplier. Accordingly, it would be duplicative to consider those factors and we decline to award any lump sums.

C. Counterclaim Costs Claimed by Bowes (Trial Only)

31 Bowes claims a separate set of trial costs on Column 4 (the counterclaim sought damages of a minimum $600,000 from Bowes and the numbered company, 1088924 Alberta Ltd.) doubled from date of the formal offer, December 29, 2011. He does not seek a multiplier or appeal costs.

TAB 6

Most Negative Treatment: Distinguished
Most Recent Distinguished: Blaze Energy Ltd. v. Imperial Oil Resources | 2014 ABQB 509, 2014 CarswellAlta 1498, 244 A.C.W.S. (3d) 32, [2014] A.W.L.D. 3990, [2014] A.W.L.D. 4065, [2014] A.W.L.D. 4066, [2014] A.W.L.D. 4073, [2014] A.W.L.D. 4077, [2014] A.W.L.D. 4079, [2014] A.W.L.D. 4080, [2014] A.J. No. 916 | (Alta. Q.B., Aug 15, 2014)

1999 ABQB 801
Alberta Court of Queen's Bench

Trizec Equities Ltd. v. Ellis-Don Management Services Ltd.

1999 CarswellAlta 1469, 1999 ABQB 801, [1999] A.J. No. 1252, 251 A.R. 101

Trizec Equities Limited, Plaintiff and Ellis-Don Management Services Ltd., et al, Defendants and The Cohos Evamy Partnership et al, Third Parties and Trizec Equities Limited et al, Fourth Parties

Western Caissons Limited, Plaintiff by Counterclaim and Trizec Equities Limited et al, Defendants by Counterclaim

Hardy BBT Limited, Plaintiff by Counterclaim and Trizec Equities Limited et al, Defendants by Counterclaim

Mason J.

Judgment: October 27, 1999
Docket: 8901-05540

Proceedings: additional reasons to (1998), 1998 CarswellAlta 143, 42 C.L.R. (2d) 1, 227 A.R. 1, 66 Alta. L.R. (3d) 1, [1998] A.J. No. 179, [1999] 5 W.W.R. 1 (Alta. Q.B.); affirmed (1999), 1999 CarswellAlta 994 (Alta. C.A.)

Counsel: *B.G. Nemetz*, *E.B. Mellett*, for Trizec Equities Ltd.
T.C. Ferguson, Q.C., for Hardy BBT Ltd.
A.J. McConnell, for Western Caissons Ltd.

Subject: Civil Practice and Procedure; Corporate and Commercial; Torts; Insurance; Contracts

Related Abridgment Classifications

Civil practice and procedure
XXIV Costs
  XXIV.8 Scale and quantum of costs
    XXIV.8.d Quantum of costs
      XXIV.8.d.ii Allowance of increased costs

Contracts
IX Performance or breach
  IX.8 Breach
    IX.8.a General principles

Professions and occupations
X Engineers
  X.6 Professional negligence
    X.6.e Miscellaneous

Torts
XVI Negligence
XVI.2 Duty and standard of care
XVI.2.b Standard of care

Headnote

Practice --- Costs — Scale and quantum of costs — Quantum of costs — Allowance of increased costs

Table of Authorities

Cases considered by *Honourable Mr. Justice D.B. Mason*:

Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co., 1998 CarswellAlta 368, 216 A.R. 304, 175 W.A.C. 304, 61 Alta. L.R. (3d) 256, [1998] 10 W.W.R. 736 (Alta. C.A.) — considered

Lawler v. Ron's Coach & Bus Repairs Inc., 1998 CarswellAlta 526, 68 Alta. L.R. (3d) 107, 1998 ABQB 510 (Alta. Q.B.) — considered

Reese v. Alberta (1992), 5 Alta. L.R. (3d) 40, [1993] 1 W.W.R. 450, 9 C.E.L.R. (N.S.) 65, (sub nom. *Reese v. Alberta (Minister of Forestry, Lands & Wildlife))* 133 A.R. 127, 13 C.P.C. (3d) 323, 11 Admin. L.R. (2d) 265n, 1992 CarswellAlta 138 (Alta. Q.B.) — considered

Sidorsky v. CFCN Communications Ltd., 27 Alta. L.R. (3d) 296, 35 C.P.C. (3d) 239, [1995] 5 W.W.R. 190, 167 A.R. 181, 1995 CarswellAlta 86 (Alta. Q.B.) — referred to

Sidorsky v. CFCN Communications Ltd., 1997 CarswellAlta 772, 53 Alta. L.R. (3d) 255, [1998] 2 W.W.R. 89, 206 A.R. 382, 156 W.A.C. 382, 15 C.P.C. (4th) 174, 40 C.C.L.T. (2d) 94 (Alta. C.A.) — considered

Statutes considered:

Court of Queen's Bench Act, R.S.A. 1980, c. C-29
s. 19 — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68
R. 601-612 — referred to

Rules of Court, 1990, B.C. Reg. 221/90
Generally — referred to

App. B, s. 7 — referred to

Tariffs considered:

Alberta Rules of Court, Alta. Reg. 390/68
Sched. C, Tariff of Costs — considered

Sched. C, Tariff of Costs, column 6 — considered

Sched. C, Tariff of Costs, item 21 — considered

ADDITIONAL REASONS to judgment reported at 1998 CarswellAlta 1469 (Alta. Q.B.) with respect to costs.

***Honourable Mr. Justice D.B. Mason*:**

Introduction

1 This is an application for costs by the Defendants Hardy BBT Limited (hereinafter "Hardy"), now known as AGRA Earth & Environmental Limited, and Western Caissons Limited ("Western Caissons"), now known as AGRA Foundations Limited, for the costs of the trial of this action, as successful Defendants against the claims advanced by the Plaintiff, Trizec Equities Limited ("Trizec"). In its application, Hardy seeks directions respecting its Bill of Costs on the following issues:

(a) What is the appropriate scale of party-party costs to be applied under Schedule "C" of the Tariff of Costs of the Court of Queen's Bench of Alberta?

(b) Should the inflation multiplier be applied to the fee portion of the Bill of Costs?

(c) Is the Defendant Hardy entitled to tax costs for second counsel at trial?

(d) Does Item 21 on Schedule C apply to the first day of each witness examined for discovery?

(e) Should there be a special allowance for written submissions?

(f) Is the Defendant Hardy entitled to tax the reasonable accounts of the experts retained by it?

(g) Is the Defendant Hardy entitled to an allowance for daily transcripts at trial?

(h) Is the Defendant Hardy entitled to an enhanced fee for preparation of the Bill of Costs and taxation?

2 The Defendant, Western Caissons, applies for direction with respect to its taxable costs, and specifically raises the following issues:

(a) Is this Defendant entitled to tax costs for second counsel?

(b) Is this Defendant entitled to recovery of its reasonable costs paid to Marc Sabourin, Dr. N.R. Morgenstern, Ronald Hendy and Sandy Navrady with respect to their presentation of expert evidence at the Trial of the within action?

(c) Is this Defendant entitled to recovery of its reasonable costs paid to Marc Sabourin as proper officer in this Action?

(d) Is this Defendant entitled to an enhanced fee for the submission of written argument after the conclusion of Trial?

(e) Is this Defendant entitled to an enhanced fee for the costs associated with the preparation of the Bill of Costs?

(f) Is this Defendant entitled to an enhanced fee for all correspondence necessarily relating to the within proceedings?

(g) Is this Defendant entitled to costs based upon a multiple of Column 6 of Schedule "C" to the Rules of this Honourable Court? If so, what multiple should apply?

(h) Should any costs awarded to this Defendant be grossed up to take into account the effects of inflation since Schedule "C" to the Rules of this Honourable Court were implemented [in 1984]?

3 The Plaintiff, Trizec, does not take issue with the following matters raised by these applications for costs:

(1) Entitlement to second counsel fee where in attendance at trial;

(2) Entitlement to a reasonable special allowance for written submissions;

(3) The general principle of entitlement to tax reasonable accounts of most experts; and

(4) An allowance for daily trial transcripts.

4 Trizec disputes the Defendants' claims for a multiple of four times Column 6 of the old Schedule"C" of the *Alberta Rules of Court*, and any allowance for an inflationary multiple. Trizec also takes issue with the charges sought for the expert witnesses Ronald Hendy and Marc Sabourin. Finally, Trizec disagrees with the Defendants' interpretation of Item 21 of old Schedule "C", concerning examination for discovery.

Summary of the Action

5 On April 14, 1989, Trizec issued its Statement of Claim in these proceedings against a number of defendants, including Hardy and Western Caissons (collectively referred to as "the Defendants"). Third and fourth party proceedings were initiated as well as counterclaims by both of these Defendants.

6 The Plaintiff's action against Hardy was for breach of contract and professional negligence in the delivery and performance of geotechnical services on the Plaintiff's Bankers Hall project. It was alleged that, as a result of Hardy's alleged professional negligence, the shoring wall on 9th Avenue S.W. moved, causing the Plaintiff to suffer damages in excess of $20 Million, inclusive of interest, as a consequence of delay, redesign, loss of parking revenue, the BP renegotiation and other claims for damages.

7 As against Western Caissons, Trizec claimed breach of contract, professional negligence in the design and installation of the shoring wall, the design and installation of the site dewatering system and claimed damages on the same basis as against Hardy.

8 The trial of the action commenced September 11, 1995 and testimony concluded on July 12, 1996, following 145 days of court sittings.

9 Judgment was rendered on February 13, 1998, finding that neither Hardy nor Western Caissons were legally responsible for the construction problems experienced at Bankers Hall. Trizec's action, as framed at the commencement of trial, was dismissed with costs to be spoken to on proper application. The judgment roll was filed on March 27, 1998.

10 No oral submissions were made by counsel in open court following the trial. Counsel submitted, and I accepted, their submissions that the parties file written argument. In hindsight my decision was unwise. Written arguments were filed in September and October of 1996. The parties were asked to address certain, specific issues in December of 1996 and to provide short summaries of their arguments with respect to geotechnical issues in January of 1997. At that time, the parties were also asked to provide a time line for the shoring wall on 9th Avenue, S.W.

11 Further submissions were sought from counsel respecting certain insurance issues, which were filed in October of 1997. Finally, counsel were requested to provide further submissions respecting Trizec's claim for loss of revenue related to the loss of the fifth level of parking at Bankers Hall, the acquisition of Gagliardi Parkade and issues of mitigation.

12 Trizec claimed damages in excess of $20 Million as a consequence of the delay, re-design, loss of parking revenue, re-negotiations with the lead tenant as well as other related heads of damage.

13 The major portion of the trial involved issues of geotechnical assessment, design and construction of the shoring wall for the installation of the foundation for Bankers Hall.

14 The trial was lengthy and complex. Geotechnical issues and certain issues of damages were novel. Experts were called, not only with respect to issues respecting breach of contract and professional negligence, but also in the area of damages and insurance. The case proceeded following a number of 'late in the day' pre-trial agreements that reduced the number of

party, it is unfair to require the successful party to bear any costs incurred by his counsel in prosecuting or defending the action. On the other hand, it is argued that if the unsuccessful party is required to bear all the costs of the successful party, citizens will be unduly hesitant to sue to assert their rights (even valid ones) or to defend their rights when sued. The partial indemnity practice as it exists in Canada is a compromise intended to give some scope in practice for each of the conflicting policy considerations.

21 In Alberta, the application of this philosophy has, in the usual course, lead to an attempt by the Courts to award costs which achieve indemnity in the range of 40% to 50%. This practice is reflected in the discussions of the Schedule C Committee, which was struck in order to develop the amendments to Schedule C which were adopted in 1998. At page 5 of its Interim Report the Committee stated that:

> The hard issue is what share of the actual costs should be borne by the unsuccessful litigant. Should it be 80% as perhaps in England or 15% as in Alberta. The Committee considers that it should approach 40-50% in a typical case. Any number is, of course, arbitrary. We must also remember that costs are in the Court's discretion and can be increased or reduced as the case warrants. In fact, however, that discretion is often not exercised.

22 In instances where the Court determines that it is necessary to depart from Schedule C and exercise its discretion to increase costs beyond those set out in the tariff, it has been the practice in Alberta to order costs based on a multiple of fees set by Schedule C. In its report dated September 2, 1997, the Schedule C Committee reiterated its views concerning the aim of a 40 to 50% recovery rate and discussed a more appropriate way in which to deal with costs where the application of Schedule C rendered an inadequate level of recovery. At p. 3, the Committee wrote:

> In formulating the revised schedule, the Committee aimed at providing 40% to 50% indemnity in a typical case. In circumstances where the revised schedule meets that target there will generally be no need for the Court to exercise its discretion. When the Court does exercise its discretion, reference to a proportion of solicitor and client costs can provide valuable guidance for the Court and other litigants.
>
> By way of example, a case where the amount at stake is small but important legal issues are involved the costs under the appropriate column of Schedule C might provide only10% of the actual solicitor and client costs for the successful litigant. Assuming that the litigation was conducted fairly and efficiently, the successful litigant could ask the Court to exercise it's discretion to increase the award beyond the appropriate column. If the Court considers that 50% indemnity is appropriate in the circumstances but merely awards costs on a higher column or on a multiple of a column, it provides little or no guidance to other litigants about the appropriate level of costs. However, if the Court awards 50% of actual solicitor and client costs in those terms, then that provides a clear reference point for other cases. Similarly, an unsuccessful litigant may, in the right circumstances, ask for a similar costs order on the basis that the tariff would produce more than 50% indemnity.
>
> ... It is the Committee view that the Court should make the ultimate determination of the appropriate level of costs on an ongoing basis and that this is a healthy process provided that decisions on costs are transparent enough to provide meaningful guidance.

23 Schedule C, like all fixed tariffs, is a very crude method by which to assess costs and the application of a multiplier only exacerbates those inadequacies. Eric T. Spink, formerly of the Alberta Law Reform Institute, prepared a background paper for the Schedule C Committee entitled *Party and Party Costs* (October, 1995) [unpublished]. At page 65 he observed:

> In [the context of cost shifting], schedule C appears to be an obviously dated and crude instrument for addressing the difficult issues surrounding party and party costs. Changing the numbers would be an easy enough task if there was any indication just what the numbers were supposed to accomplish. It seems impossible to relate the existing schedule C to any targeted proportion of actual fees, and an adjustment for inflation without a sound base figure is really a shot in the dark. The fixed tariff approach is so inherently problematic that the committee can't go far wrong by adjusting the numbers, assuming the mandate of the committee is so restricted. There are no successful fixed tariffs upon which to model Schedule C.

24 The British Columbia *Supreme Court Rules* explicitly acknowledge that, in some circumstances, an award of costs based on the tariff of fees will be inadequate. Accordingly, those *Rules* provide for an order of "increased costs" where the Court determines that ordinary costs (similar to our party and party costs) would lead to an unjust result. (See: Appendix B, section 7 of the British Columbia *Supreme Court Rules*). Increased costs are calculated as 50% of special costs (essentially solicitor client costs), or such other proportion as the Court may order. In awarding increased costs the British Columbia Courts have routinely employed the percentage concept.

25 The percentage approach to determining costs is not new to Alberta, and has been employed in a number of cases. For example, in *Lawler v. Ron's Coach & Bus Repairs Inc.*, [1998] A.J. No. 660 (Alta. Q.B.), Burrows, J., although he ultimately ordered costs on a lump sum basis, adopted the percentage approach in determining the appropriate level of recovery. In that case, an award based on Schedule C would have allowed recovery of approximately 25%, however, the Court felt that an award of 33% would be more appropriate and, accordingly, made a lump sum award based on that rate. In doing so, his Lordship commented, at page 3, that, in the context of adjusting cost awards for inflation, "the ultimate goal in each situation is that the final total of costs awarded be reasonable given the nature of the case."

26 As the Court of Appeal stated in *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, [1998] A.J. No. 404 (Alta. C.A.) "Canadian taxable court costs are traditionally designed to be a fraction of solicitor client costs." Thus, in my view, where the application of Schedule C does not result in an appropriate level of costs it makes infinitely more sense to simply determine what percentage of indemnity is appropriate and make the award on a percentage basis, than it does to determine the appropriate level of costs and then invent a formula, using a multiplier, to arrive at that level of recovery. Put another way, determining a level of recovery and then working backwards to find an equation which supports it is an exercise in fiction which, as the Schedule C Committee pointed out, is of little precedential value to either the Courts or future litigants.

27 It is my opinion that, in the majority cases, Schedule C, in either its present or previous form, cannot realistically achieve an appropriate level of costs in the context of complex and protracted litigation. Schedule C was instituted for the purpose of dealing with the common stream of litigation. Long trials do not fit the mould for a number of reasons which include: the time for preparing and organizing documents for the purposes of production; the preparation time required in relation to examinations for discovery; the utilization of technology and computers to prepare immediate court records; the inordinate efforts involved in collating testimony and thousands of pages of exhibit documents in order to prepare written submissions following trial; and the fact that these trials consume counsels' time for many months to the exclusion of any other work. The deficiencies created by the application of Schedule C in the context of unusually long trials was also recognized by the Court of Appeal in *Ed Miller Sales & Rentals Ltd.* , *supra*.

28 The application of a multiplier is particularly ill-suited to long trials. As Trizec points out, where a long trial is concerned, the application of a multiplier may overcompensate the successful party in relation to those items included in the tariff which operate on a per diem basis. Thus, they argue, the longer the trial runs the more likely it is that a multiplier will produce a costs award which approaches indemnity. Conversely, Western Caissons submits that even with the application of a multiplier, the award would be insufficient in relation to some items included within the tariff. As a result they have asked for enhanced awards in relation to the written arguments prepared and submitted at the request of the Court, the preparation of the Bill of Costs and the correspondence necessarily relating to the proceedings. It takes the position that an enhanced order for costs in relation to those items is necessary in order to appropriately compensate for the costs attendant on those items which, in this case, are much greater than the amounts recoverable under Schedule C, even with the application of the suggested multiplier.

29 While the Schedule C Committee considered and rejected adopting, whole scale, a more principled approach to awarding costs in the context of the ordinary stream of litigation, in my view utilizing a percentage approach to costs, at least in the situation of long and complex trials, avoids the fiction of applying multipliers to set fees.

30 I agree with the Schedule C Committee that an award for costs should, generally speaking, approach the 50% mark. However, as the Committee recognized the level of indemnity will vary in some cases, in my view the percentage of recovery should reflect the merits of the case, the respective relationship between the parties, the risks faced as a consequence of the litigation, the length and complexity of the trial and the preparation, presentation and submissions made to assist the Court in

its deliberations. This is not intended to be an exhaustive list, and in other circumstances the criteria may vary.

31 In the present case, Trizec approached the task of prosecuting its claim by putting at issue the whole of the Defendants' Calgary operations over the last 15 to 20 years. To assist in proving its case, Trizec called experts in a number of disciplines including: the field of geotechnical analysis, from glaciologists to geotechnical engineers; soil analysis and dewatering of major downtown excavation sites; global stability analysis and developing computer technology; real estate evaluation; commercial and retail leasing; and insurance and owner-controlled insurance programmes designed for major construction sites. Given the scope of the case put forward by Trizec, the Defendants were obliged to present an equally thorough and broad defence. Additionally, although the action was brought against a variety of building professionals, including architects, structural engineers, the general contractor and the building sub-contractors, Trizec took strategic aim and sought recovery from these two Defendants in particular. One of those Defendants, Hardy, was without professional negligence insurance which was known to Trizec as it was an issue at the trial. Western Caissons was insured under the owner controlled insurance which was put in place at Trizec's behest and was clearly inadequate to meet the scope of the claims and the heads of damages advanced by Trizec. Given the magnitude of the damages sought, Hardy and Western Caissons, without the benefit of adequate insurance coverage, had little choice but to defend against the claims advanced by Trizec, a task which, by itself, had the potential to bankrupt both parties.

32 In light of those circumstances, I find that a costs award based on a 50% recovery level would be inadequate in this type of case. Accordingly, I award costs in favour of the Defendants, in an amount equal to 60% of what will be assessed as appropriate solicitor client costs. This approach to the assessment of costs will change a number of the issues raised before me on the application for costs in the first instance.

33 I am hopeful that with this ruling, the parties may be able to finalize all cost issues between them. However, I am prepared to revisit any of the cost issues raised before me on the initial applications, on proper notice.

Order accordingly.

End of Document

TAB 7

Most Negative Treatment: Distinguished
Most Recent Distinguished: Blaze Energy Ltd. v. Imperial Oil Resources | 2014 ABQB 509, 2014 CarswellAlta 1498, 244 A.C.W.S. (3d) 32, [2014] A.W.L.D. 3990, [2014] A.W.L.D. 4065, [2014] A.W.L.D. 4066, [2014] A.W.L.D. 4073, [2014] A.W.L.D. 4077, [2014] A.W.L.D. 4079, [2014] A.W.L.D. 4080, [2014] A.J. No. 916 | (Alta. Q.B., Aug 15, 2014)

2001 ABQB 968
Alberta Court of Queen's Bench

LSI Logic Corp. of Canada Inc. v. Logani

2001 CarswellAlta 1733, 2001 ABQB 968, [2001] A.J. No. 1751, [2002] 4 W.W.R. 531, [2002] A.W.L.D. 140, 100 Alta. L.R. (3d) 49, 109 A.C.W.S. (3d) 866

In the Matter of Section 190 of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended

In the Matter of LSI Logic Corporation of Canada, Inc. and its shareholders

LSI Logic Corporation of Canada, Inc., Petitioner and Ramesh Logani and all other Dissenting Shareholders as Listed in Schedule A to the Petition, Respondents

The Canadian Pacific Limited Pension Trust Fund (Registered in the Name of Queen & Co.), The Canadian Pacific Express Transport Pension Trust Fund (Registered in the Name of Queen & Co.), The Canadian Pacific Hotels Master Trust "B" Pension Trust Fund (Registered in the Name of Queen & Co.), The Toronto Terminals Railway Company Pension Trust Fund (Registered in the Name of Queen & Co.), David W. Martin, Brian W.F. McLoughlin, Mary A. Sarah McLoughlin, Ivar Liepins, Luther Lee, Dean Temple, Wes Miller, Jyotsana Pachai, Gordon Waldmo, Lai-Fong Leung, Rebecca Wan, Azzedine Boubguira, Ramesh Logani, Gordon Sabiston, Joseph Szammer, Vally Szammer, Damir Andrei Susnjar, Neil Elliott, Donna Denison, Alex Ngi, James Soroka, Lawrence Pick, Peter Arabchuk, Beverly Cowan, Robert MacKechnie, Heather MacKechnie, Robert Ruddy, Timothy McCourt and Wilson Wong, Plaintiffs and LSI Logic Corporation of Canada, Inc., LSI Logic Corporation, 3096467 Canada Inc., LSI Logic Netherlands BV, David E. Sanders, Albert E. Pimentel, Horst Sandfort, Travis A. White, Thomas G. Smillie and Albrecht W.A. Bellstedt, Defendants

Fruman J.

Judgment: November 13, 2001
Docket: Calgary 9501-15628, 9901-04378

Proceedings: additional reasons to (2001), 204 D.L.R. (4th) 443, [2001] 11 W.W.R. 740, 19 B.L.R. (3d) 101, 96 Alta. L.R. (3d) 162 (Alta. Q.B.)

Counsel: *E. David D. Tavender, Q.C.*, *Gordon L. Tarnowsky*, *Lindsay A.M. Holukoff*, for LSI Logic Corporation of Canada Inc.
Leslie R. Duncan, Q.C., *Gordon J. McCue*, for Shareholders
Roderick A. McLennan, Q.C., *Donald W. Dear*, for Directors and Officers

Subject: Corporate and Commercial; Civil Practice and Procedure

Related Abridgment Classifications

Business associations
III Specific matters of corporate organization

III.3 Shareholders
III.3.e Shareholders' remedies
III.3.e.i Derivative actions
III.3.e.i.A At common law
III.3.e.i.A.3 Ultra vires transactions

Business associations
III Specific matters of corporate organization
III.3 Shareholders
III.3.e Shareholders' remedies
III.3.e.ii Relief from oppression
III.3.e.ii.C Oppressive conduct
III.3.e.ii.C.5 Miscellaneous

Civil practice and procedure
X Pleadings
X.2 Statement of claim
X.2.f Striking out for absence of reasonable cause of action
X.2.f.v Cause not known in law

Civil practice and procedure
XII Discovery
XII.1 Introductory
XII.1.a Purpose of discovery

Headnote

Corporations --- Shareholders — Shareholders' remedies — Relief from oppression — Miscellaneous issues
Corporation created "going private" transaction whereby corporation would regain shares held by public in exchange for monetary compensation — Proceedings were undertaken to determine value of shares — Plaintiff shareholders filed claim alleging oppression — Shareholders' motion to strike fair value proceedings was dismissed — Corporation's motion to strike oppression claim was granted — Motions judge held corporation acted within its authority under Canada Business Corporations Act by consolidating shares and cancelling fractional shares — Motions judge found rights of minority shareholders were protected under transaction arrangement — Further submissions respecting costs were heard — Proceedings involved complex issues — Shareholders were precluded from attacking court's jurisdiction on grounds of res judicata — Shareholders breached implied undertaking not to disclose and had engaged in abuse of process — Corporation was awarded 2/3 of solicitor and client costs — Directors of corporation were awarded 1/3 of solicitor and client costs — Costs were awarded against all shareholders on joint and several basis — Canada Business Corporations Act, R.S.C. 1985, c. C-44.

Table of Authorities

Cases considered by *Fruman J.*:

Apotex Inc. v. Egis Pharmaceuticals (1991), 4 O.R. (3d) 321, 37 C.P.R. (3d) 335, [1991] O.J. No. 1232 (Ont. Gen. Div.) — referred to

Carbone v. De La Rocha, 13 O.R. (3d) 355, 1993 CarswellOnt 1044 (Ont. Gen. Div.) — referred to

Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co., 1998 CarswellAlta 368, 216 A.R. 304, 175 W.A.C. 304, 61 Alta. L.R. (3d) 256, [1998] 10 W.W.R. 736 (Alta. C.A.) — referred to

Filipovic v. Upshall, 1998 CarswellOnt 4286, [1998] O.J. No. 4498 (Ont. Gen. Div.) — referred to

Guarantee Co. of North America v. Beasse, 14 C.P.C. (3d) 182, 139 A.R. 241, 1993 CarswellAlta 463, [1993] A.J. No. 1073 (Alta. Q.B.) — referred to

Jackson v. Trimac Industries Ltd., 8 Alta. L.R. (3d) 403, 138 A.R. 161, [1993] 4 W.W.R. 670, 1993 CarswellAlta 310, [1993] A.J. No. 218 (Alta. Q.B.) — considered

King v. On-Stream Natural Gas Management Inc., 21 C.P.C. (3d) 16, 1993 CarswellBC 681 (B.C. S.C.) — considered

Reese v. Alberta (1992), 5 Alta. L.R. (3d) 40, [1993] 1 W.W.R. 450, 9 C.E.L.R. (N.S.) 65, (sub nom. *Reese v. Alberta (Minister of Forestry, Lands & Wildlife))* 133 A.R. 127, 13 C.P.C. (3d) 323, 11 Admin. L.R. (2d) 265n, 1992 CarswellAlta 138, [1992] A.J. No. 745 (Alta. Q.B.) — referred to

Sidorsky v. CFCN Communications Ltd., 27 Alta. L.R. (3d) 296, 35 C.P.C. (3d) 239, [1995] 5 W.W.R. 190, 167 A.R. 181, 1995 CarswellAlta 86, [1995] A.J. No. 174 (Alta. Q.B.) — referred to

Sidorsky v. CFCN Communications Ltd., 1997 CarswellAlta 772, 53 Alta. L.R. (3d) 255, [1998] 2 W.W.R. 89, 206 A.R. 382, 156 W.A.C. 382, 15 C.P.C. (4th) 174, 40 C.C.L.T. (2d) 94 (Alta. C.A.) — referred to

Trizec Equities Ltd. v. Ellis-Don Management Services Ltd. (1999), 251 A.R. 101 (Alta. Q.B.) — considered

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44
Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68
R. 601(1) — considered

R. 601(1)(a) — referred to

R. 601(1)(b) — referred to

R. 601(1)(c) — referred to

R. 601(1)(e) — considered

R. 601(1)(g)(i) — referred to

R. 601(2)(a) — considered

R. 601(2)(d) — referred to

R. 601(2)(e) — considered

R. 601(2)(f) — referred to

Tariffs considered:

Alberta Rules of Court, Alta. Reg. 390/68
Sched. C, Tariff of Costs — considered

Sched. C, Tariff of Costs, column 5 — referred to

ADDITIONAL REASONS to judgment reported at 2001 ABQB 710, 2001 CarswellAlta 1100, 204 D.L.R. (4th) 443, [2001] 11 W.W.R. 740, 19 B.L.R. (3d) 101, [2001] A.J. No. 1083, 96 Alta. L.R. (3d) 162 (Alta. Q.B.), respecting costs.

***Fruman J.*:**

1 The plaintiffs are former shareholders of LSI Logic Corporation of Canada, Inc. They applied to strike fair value proceedings they had enthusiastically supported for more than three years. They also filed a new statement of claim, alleging oppression against LSI Canada and its directors and officers. LSI Canada stoutly defended its fair value proceedings, and moved to strike the oppression claim. The disagreement, which created a three-year diversion, culminated in five motions that I heard in a special chambers application in March, 2001.

2 LSI was successful in all five applications: *LSI Logic Corp. of Canada Inc. v. Logani*, 2001 ABQB 710, [2001] A.J. No. 1083 (Alta. Q.B.). In the judgment I (i) dismissed the Shareholders' application to strike LSI Canada's fair value proceedings on the merits; (ii) decided that the Shareholders' application to strike was an abuse of process based on the doctrines of *res judicata* and election; (iii) determined that the Shareholders violated the implied undertaking in Alberta law not to use information disclosed in the fair value proceedings for a collateral purpose and an express undertaking they had given not to use the information in any other litigation; (iv) decided they should not be relieved from the breach of their undertakings and granted an injunction restraining the Shareholders from making use of confidential information disclosed to them in the course of discovery; and (v) struck or stayed various portions of the Shareholders' statement of claim in the oppression action.

LSI Canada's Costs

3 The parties agree that LSI Canada is entitled to its costs. They disagree on quantum. The Shareholders contend that LSI Canada should receive party and party costs based on single column 5 of Schedule C to the *Alberta Rules of Court*, Alta. Reg. 390/68; LSI Canada submits that partial indemnity costs are appropriate. The parties are more than half a million dollars apart.

4 Costs are in the discretion of the court, and subject to the test of reasonableness, necessity or prudence: *Guarantee Co. of North America v. Beasse*, [1993] A.J. No. 1073 (Alta. Q.B.) at para. 13. There are three levels of costs: party and party costs; solicitor and client costs, which indemnify for costs that are essential to and arise within the four corners of the litigation; and solicitor and his own client costs, which may include services that are not strictly essential to the litigation: *Trizec Equities Ltd. v. Ellis-Don Management Services Ltd.* (1999), 251 A.R. 101 (Alta. Q.B.), at 106 citing *Sidorsky v. CFCN Communications Ltd.* (1995), 27 Alta. L.R. (3d) 296 (Alta. Q.B.) at 299.

5 Although a court has broad discretion in awarding costs, absent any misconduct on the part of the litigants, courts generally award costs on a party and party basis to balance two competing interests. On the one hand it is unfair to require a successful party whose conduct is not blameworthy to bear any costs incurred in prosecuting or defending the action; on the other hand, citizens will be hesitant to assert valid legal rights or even defend an action if an unsuccessful party is required to bear all the costs: *Trizec, supra*, at 106; *Reese v. Alberta* (1992), 133 A.R. 127 (Alta. Q.B.) at 130. See also: *Sidorsky v. CFCN Communications Ltd.* (1997), 206 A.R. 382 (Alta. C.A.) at 391.

6 In *Jackson v. Trimac Industries Ltd.* (1993), 138 A.R. 161 (Alta. Q.B.) at 172-73, the court characterized the award of complete indemnity costs as "rare and exceptional" and noted examples of conduct that would attract such an award. Although impropriety is an issue in this case, the tests for complete indemnity costs are not met.

7 Party and party costs are therefore appropriate. However, Schedule C is not to be applied mechanically in every case. It is "a very crude method by which to assess costs" and "cannot realistically achieve an appropriate level of costs in the context of complex [...] litigation": *Trizec, supra*, at 106 and 108. Schedule C is addressed to taxing officers: *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1998), 216 A.R. 304 (Alta. C.A.) at 306. A judge has more flexibility. Courts may fix all or part of the costs with or without reference to Schedule C (R. 601.(2)(a)); award a gross lump sum instead of, or in addition to, any taxed costs (R. 601.(2)(e)); award all or part of costs as a multiple or proportion of Schedule C or as a proportion of solicitor and client costs (R. 601.(2)(d)); and award costs to different parties on different scales (R. 601.(2)(f)).

equal. I accept that defending the fair value proceedings, with their complicated legal history, would have involved more effort than launching the claims. Moreover, it is evident that LSI Canada's counsel did more work than the Shareholders' counsel in terms of the number of witnesses they presented, the documents they reviewed and assembled, and the depth of their legal research. In any event, a party that is sued "is not expected to shop for cheaper services but is entitled to be represented by counsel of its choice": *Apotex Inc. v. Egis Pharmaceuticals* (1991), 4 O.R. (3d) 321 (Ont. Gen. Div.) at 323. Concerns about the nature of the legal services can be addressed through taxation.

16 All of the factors I have considered to this point would support a costs award in the 40% to 50% indemnification range. However a court, in setting costs, is permitted to consider whether any step in the proceedings was improper, vexatious or unnecessary (R. 601.(1)(g)(i)). While courts should not discourage the assertion of valid legal rights by imposing heavy costs awards, the same is not true for vexatious proceedings. Regrettably, the Shareholders' litigation has a gloss of impropriety, which dictates a higher costs award.

17 The Shareholders might have thought they had a chance of challenging the validity of the fair value proceedings on the merits. But they could not have thought that their challenge was timely or appropriate. They were well aware that they had actively participated in, taken the benefit of, and invoked the court's jurisdiction and assistance in the fair value proceedings for more than three years. They had obtained, from the very court whose jurisdiction they later challenged, a court order paying them $3.00 per share on account of fair value, in respect of a transaction they later argued was *ultra vires* and unlawful. The Shareholders not only elected to follow the fair value proceedings instead of challenging them, they were also precluded from attacking the court's jurisdiction on the basis of *res judicata*. Their attempt to strike the fair value proceedings was an abuse of process.

18 Equally serious, in launching the oppression claim the Shareholders breached the implied undertaking under Alberta law not to use information disclosed in the fair value proceedings for a collateral purpose, as well as their express contractual undertaking not to use information disclosed in the fair value proceedings in any other litigation. The Shareholders' counsel concedes that the violation of both the express and implied undertaking "may seem to be misconduct". He contends, however, that "there is no element of willful misconduct or lack of good faith" (Shareholders' costs brief at 8). This bare assertion is not supported by evidence that permits me to examine the Shareholders' motives in order to reach that conclusion.

19 The implied undertaking applies as a matter of law to the Shareholders, as it applies to every other Alberta litigant. Its violation is an abuse of the court's process: *Carbone v. De La Rocha* (1993), 13 O.R. (3d) 355 (Ont. Gen. Div.), at 369. Because the implied undertaking applies equally to parties and to their legal counsel, it cannot be assumed, in the absence of compelling reasons, that the undertaking was breached "in good faith".

20 The express undertaking in this case was created by contract. It was agreed by counsel that the documents disclosed through the course of the proceedings were "not to be used except for the purposes of this litigation" (Agreed Record, Tab VIII hh). The parties agreed that the documents would not be disclosed to all dissenting shareholders, but only to members of the Dissenting Shareholders Committee who would agree to accept the non-disclosure conditions in writing before reviewing the documents (Agreed Record, Tab VIII ii). These express provisions leave little room for excuses.

21 These breaches were serious; I refused to waive them and I granted an injunction against the Shareholders. LSI Canada was forced to prove these breaches in order to strike out portions of the oppression claim. It had no choice but to defend its fair value proceedings from a challenge that was an abuse of process. Whatever the Shareholders' motives might have been, LSI Canada should not be compelled to bear the costs of improper and unnecessary proceedings.

22 Finally, I note that in February of 1998 the parties put in place an elaborate protocol for the management of information requests, expert reports, evidence at trial, judicial dispute resolution and case management, the intent of which was to "facilitate a summary and efficient resolution" of the fair value dispute in the Court of Queen's Bench (Agreed Record, Tab VIII rr). That protocol, negotiated by the parties, was the subject of a consent order, which has not been appealed. It invited the court to impose costs and other sanctions, including solicitor and client costs, "if at any time in the opinion of the Court either of the parties has not, without reasonable excuse, met the intent of the protocol." I do not rely on the protocol in imposing costs in this case. However, I do note that the Shareholders' three year diversion has resulted in anything but a summary and efficient resolution.

TAB 8

Most Recent Reversed: Mikkelsen v. Truman Development Corp. | 2017 ABCA 99, 2017 CarswellAlta 473, [2017] A.W.L.D. 1698, [2017] A.W.L.D. 1699, [2017] A.W.L.D. 1701, [2017] A.W.L.D. 1704, [2017] A.W.L.D. 1705, [2017] A.W.L.D. 1706, [2017] A.W.L.D. 1709, 67 B.L.R. (5th) 192, 277 A.C.W.S. (3d) 88 | (Alta. C.A., Mar 24, 2017)

2016 ABQB 255
Alberta Court of Queen's Bench

Mikkelsen v. Truman Development Corp.

2016 CarswellAlta 833, 2016 ABQB 255, [2016] A.W.L.D. 2475, [2016] A.W.L.D. 2476, [2016] A.W.L.D. 2481, [2016] A.W.L.D. 2488, [2016] A.W.L.D. 2490, [2016] A.W.L.D. 2491, [2016] A.W.L.D. 2492, 267 A.C.W.S. (3d) 596

Wayne Mikkelsen, Colin Wade Mikkelsen, Meghen Anine Mikkelsen and Alana Denise Mikkelsen, Plaintiffs/Defendants by Counterclaim and Truman Development Corporation, Defendant/Plaintiff by Counterclaim

M.C. Erb J.

Heard: March 10, 2016
Judgment: May 6, 2016
Docket: Calgary 1201-04099

Proceedings: CD-ART *Mikkelsen v. Truman Development Corp.* (2016), 2016 CarswellAlta 149, 2016 ABQB 23, M.C. Erb J. (Alta. Q.B.)

Counsel: J.D. Murphy, J. Selnes, for Plaintiffs / Defendants by Counterclaim
R.J. Simpson, Q.C., J.W. Rose, Q.C., for Defendant / Plaintiff by Counterclaim

Subject: Civil Practice and Procedure; Contracts; Property

Related Abridgment Classifications

Civil practice and procedure
XVI Disposition without trial
XVI.6 Money in court and offers to settle
XVI.6.c Offers to settle under rules of practice
XVI.6.c.viii Miscellaneous

Civil practice and procedure
XXIV Costs
XXIV.6 Effect of success of proceedings
XXIV.6.c Divided success
XXIV.6.c.i Where action divisible

Civil practice and procedure
XXIV Costs
XXIV.7 Particular orders as to costs
XXIV.7.e Costs on solicitor and client basis
XXIV.7.e.i General principles

Contracts

XIV Remedies for breach
XIV.5 Damages
XIV.5.d Partnership or joint venture

Headnote

Contracts --- Remedies for breach — Damages — Partnership or joint venture
Plaintiff owners of farmland and defendant developer signed agreement that developer purported created interest in property — Defendant purchased portion of farmland and registered caveats — Agreement was signed that plaintiffs claimed terminated any agreement and interest in land and caveat was removed to allow for tax rollover — Plaintiffs brought action for breach of contract — Plaintiffs sought order directing registrar of land titles to discharge caveats, order that agreement was invalid, and other relief — Defendant brought counterclaim for specific performance related to development project — Action allowed, counterclaim allowed in part — It was held that parties were not ad idem on major terms of first development agreement, and no binding agreement existed — Parties sought decision on plaintiffs' proportionate share of $438,368.06 attributable to farmland — Plaintiffs were not only landowners to have entered into agreements with defendant — Defendant argued that number of landowners to benefit from pre-development work varied from time to time, depending on work carried out — Supplementary reasons issued — Developer was entitled to recover proportionate share of $438,368.06 expended on preliminary development work attributable to development of farmland — Trial decision contemplated that pre-development costs would be allocated to landowners who benefitted from work on per owner basis — Despite fact that defendant may have agreed with third party to allocate cost of strategic servicing plan ("SSP") to six quarter sections, that agreement was not binding on plaintiffs — Any obligation owed by owners to developer for this expense arose only out of order in trial decision, not SSP agreement — Logically, SSP would benefit more landowners' interests than just those referenced in invoices — SSP was clearly beneficial to landowners beyond plaintiffs' farmland — As result, SSP costs should be allocated in aggregate among four parties who could benefit from pre-development work completed by developer, including plaintiffs and defendant itself — Even if some planning related to one part of land, it benefited developer and all landowners whose property was moved towards development — It advanced common vision for development of land as whole — Plaintiffs' share of total cost of SSP was $80,342.22 and $50,504.97 towards other expenses, resulting in its share of pre-development costs of $130,847.19.

Civil practice and procedure --- Costs — Effect of success of proceedings — Divided success — Where action divisible
Plaintiff owners of farmland and defendant developer signed agreement that developer purported created interest in property — Defendant purchased portion of farmland and registered caveats — Agreement was signed that plaintiffs claimed terminated any agreement and interest in land and caveat was removed to allow for tax rollover — Plaintiffs brought action for breach of contract — Plaintiffs sought order directing registrar of land titles to discharge caveats, order that agreement was invalid, and other relief — Defendant brought counterclaim for specific performance related to development project — Action allowed, counterclaim allowed in part — Parties sought ruling on costs — Costs awarded to plaintiffs — Plaintiffs sought full indemnity costs for actual amount paid in legal fees and disbursements of $483,531.12 — Plaintiffs succeeded on most important issue between parties, which was validity of purported agreement for joint venture to develop farmland — Defendant had argued that value of this agreement was $38.5 million, which was quantum of damages sought in its counterclaim, in alternative to specific performance — Defendant was granted judgment for $130,847.19 on its counterclaim for portion of its pre-development expenses attributable to plaintiffs — In comparison to relief sought, that success was minimal for purpose of determining costs — Trial costs were awarded to plaintiffs in amount of $200,000, plus disbursements of $8,072.95.

Civil practice and procedure --- Disposition without trial — Money in court and offers to settle — Offers to settle under rules of practice — Miscellaneous
Plaintiff owners of farmland and defendant developer signed agreement that developer purported created interest in property — Defendant purchased portion of farmland and registered caveats — Agreement was signed that plaintiffs claimed terminated any agreement and interest in land and caveat was removed to allow for tax rollover — Plaintiffs brought action for breach of contract — Plaintiffs sought order directing registrar of land titles to discharge caveats, order that agreement was invalid, and other relief — Defendant brought counterclaim for specific performance related to development project — Action allowed, counterclaim allowed in part — Parties sought ruling on costs — Costs awarded to plaintiffs — In addition to ordering essentially same relief set out in offer to settle in principal action, judgment was granted on counterclaim for pre-development costs in amount now fixed at $130,847.19 — Net judgment did not exceed offer to settle because plaintiffs

made no monetary offer and received no monetary award — Court has discretion to consider informal offers to settle that do not satisfy Alberta Rules of Court — Here, plaintiffs' offer to settle addressed principal issue between parties — Defendant sought specific performance of agreement, or alternatively more than $38.5 million in damages in its counterclaim, and was successful only in recovering portion of its pre-development costs in amount of $130,847.19 — Rule 4.29(1) was not triggered because plaintiffs' formal offer to settle did not equal or exceed judgement — Trial costs were awarded to plaintiffs in amount of $200,000 plus disbursements of $8,072.95, as claimed in their bill of costs.

Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and client basis — General principles
Plaintiff owners of farmland and defendant developer signed agreement that developer purported created interest in property — Defendant purchased portion of farmland and registered caveats — Agreement was signed that plaintiffs claimed terminated any agreement and interest in land and caveat was removed to allow for tax rollover — Plaintiffs brought action for breach of contract — Plaintiffs sought order directing registrar of land titles to discharge caveats, order that agreement was invalid, and other relief — Defendant brought counterclaim for specific performance related to development project — Action allowed, counterclaim allowed in part — Parties sought ruling on costs — Costs awarded to plaintiffs — As general rule, court should only depart from party and party costs in rare and exceptional circumstances — It was significant factor for determination of costs that this court found that evidence of defendant's witness contained many inconsistencies, and gave court clear impression that he changed his pre-trial questioning evidence as he listened to plaintiffs' evidence at trial — Circumstances of this case supported cost award beyond usual party and party costs, based on court's stated concerns at trial about defence witness's evidence — In addition, plaintiffs had to respond to arguments that should not have been pursued — This put plaintiffs to unnecessary extra expense and effort in proving their case — In awarding costs beyond party and party scale, court took into account plaintiffs' offer to settle and fact plaintiffs made efforts before trial to resolve dispute, despite fact that they did not achieve comparable or better result at trial — In these circumstances, costs awarded pursuant to tariff were not adequate, but it was not case that required complete indemnity — Plaintiffs were awarded lump sum of $300,000 for costs in circumstances of this case, representing total amount for costs that would otherwise be awarded pursuant to tariff was not reasonable — However, plaintiffs had maintained throughout trial their allegation that fraudulent allegations had been made on defendant's behalf — Failure to prove fraud in all circumstances required reduction in costs award — Costs were reduced by $100,000 as result — Accordingly, plaintiffs were awarded costs of $200,000, representing lump sum of $300,000 reduced by $100,000 for their unproven allegation that defendant made fraudulent misrepresentations — Plaintiffs also awarded disbursements of $8,072.95, as claimed in their bill of costs.

Table of Authorities

Cases considered by *M.C. Erb J.*:

Alberta Wheat Pool v. Fieldberg (2001), 2001 ABQB 524, 2001 CarswellAlta 842 (Alta. Q.B.) — considered

Botan v. St. Amand (2012), 2012 ABQB 260, 2012 CarswellAlta 781, 68 Alta. L.R. (5th) 359, 538 A.R. 307 (Alta. Q.B.) — referred to

Botan v. St. Amand (2013), 2013 ABCA 227, 2013 CarswellAlta 1051, 85 Alta. L.R. (5th) 199, 553 A.R. 333, 583 W.A.C. 333 (Alta. C.A.) — referred to

Chisholm v. Lindsay (2015), 2015 ABCA 179, 2015 CarswellAlta 922, 600 A.R. 311, 645 W.A.C. 311, 27 Alta. L.R. (6th) 53 (Alta. C.A.) — considered

Conway v. Zinkhofer (2007), 2007 ABQB 2, 2007 CarswellAlta 7 (Alta. Q.B.) — considered

Conway v. Zinkhofer (2008), 2008 ABCA 392, 2008 CarswellAlta 1764 (Alta. C.A.) — referred to

EAD Property Holdings (103) Corp. v. Greyhound Canada Transportation ULC (2015), 2015 ABQB 425, 2015 CarswellAlta 1259, [2016] 1 W.W.R. 112, 28 Alta. L.R. (6th) 351 (Alta. Q.B.) — considered

Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. (1998), 1998 CarswellAlta 368, 216 A.R. 304, 175 W.A.C. 304, 61 Alta. L.R. (3d) 256, [1998] 10 W.W.R. 736, 1998 ABCA 118 (Alta. C.A.) — considered evidence; disproving Mr. Trutina's claim that he did not have an original copy of the December 10, 2007 Termination Agreement, something he recanted in cross examination; insisting an independent witness had been present for signing the agreement at the Mikkelsen home necessitating the calling of the purported witness to refute the claim. These things among others put the Plaintiffs to unnecessary extra expense and effort in proving their case. In awarding costs beyond the party and party scale, this Court has taken into account the Plaintiffs' offer to settle and the fact the Plaintiffs made efforts before trial to resolve the dispute, despite the fact that they did not achieve a comparable or better result at trial.

47 In these circumstances, costs awarded pursuant to the Tariff are not adequate. At the same time, this is not a case that requires complete indemnity for the Plaintiffs' costs.

48 When costs awarded pursuant to the Tariff would be inadequate, the Court has numerous options available, as discussed by the Court of Appeal in *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, 1998 ABCA 118 (Alta. C.A.) at para 4, leave to appeal to SCC refused, 25594 (1 May 1997) [1997 CarswellAlta 1286 (S.C.C.)]:

> ...There are different ways to adjust Schedule C when its product seems inadequate: higher column, multiples of a column, a multiplier for inflation or otherwise, extra lump sums, some fraction of solicitor-client costs, and so forth. Several modes of adjustment may be reasonable; indeed several different modes may amount to much the same thing. The ultimate question is whether the final total is reasonable or not.

49 Pursuant to Rule 10.31(1)(b)(ii), this Court may award a lump sum instead of or in addition to assessed costs.

50 The Plaintiffs seek a lump sum cost award of $300,000, which is approximately 60% of their solicitor-client costs. In *Trizec Equities Ltd. v. Ellis-Don Management Services Ltd.*, 1999 ABQB 801 (Alta. Q.B.), aff'd 1999 ABCA 306 (Alta. C.A.), Mason J., stated that in the usual course in Alberta there is an "attempt by the Courts to award costs which achieve indemnity in the range of 40% to 50% in a typical case": at para 21 (QB). An award of 60% indemnity is outside the typical case.

51 The Defendant submits that a lump sum as a percentage of solicitor and client costs is inappropriate in this case because lump sums should be reserved for complex and protracted proceedings where exceptional circumstances exist, relying on *Monco Holdings Ltd. v. B.A.T. Development Ltd.*, 2005 ABQB 851 (Alta. Q.B.) at paras 26-32 and *EAD Property Holdings (103) Corp. v. Greyhound Canada Transportation ULC*, 2015 ABQB 425 (Alta. Q.B.) at paras 21 and 22. These decisions do not assist the Defendant, rather, they support this Court's discretion to award a lump sum for costs in exceptional circumstances. As discussed earlier, this case involved exceptional circumstances because proceedings were lengthened and made more complicated by Mr. Trutina, who changed his evidence at trial, and because the Defendant required numerous facts to be proved that should not have been in issue.

52 As a result, the Plaintiffs are awarded a lump sum of $300,000 for costs in the circumstances of this case, representing the total amount for costs that would otherwise be awarded pursuant to the Tariff is not reasonable. This award is subject to the Court's findings on the issue of unproven allegations of fraud.

(e) Unproven Allegations of Fraud

53 In their pleadings and at trial, the Plaintiffs alleged that Mr. Trutina made fraudulent misrepresentations. The Trial Decision concluded that while Mr. Trutina was aggressive and exerted pressure on the Mikkelsens to quickly sign the Agreement, there was insufficient evidence that his statements amounted to fraud: Trial Decision at para 167.

54 Often, a successful plaintiff who alleges but fails to prove fraud should be deprived of costs or have its costs reduced. However, this is not a general rule: *Conway v. Zinkhofer*, 2007 ABQB 2 (Alta. Q.B.) at paras 21 and 23; aff'd 2008 ABCA 392 (Alta. C.A.):

> 21 The Applicants have pointed out that solicitor-clients costs or increased costs are generally awarded where there has been an unsuccessful allegation of fraud. Actual damage to one's reputation need not be proven. *Coe v. Sturgeon General Hospital District No. 100*, [2001] A.J. No. 1037 (Alta. Q.B.).

TAB 9

Most Negative Treatment: Leave to appeal allowed
Most Recent Leave to appeal allowed: Weatherford Canada Partnership v. Artemis Kautschuk Und Kunstoff-Technik Gmbh | 2018 ABCA 323, 2018 CarswellAlta 2138, [2018] A.W.L.D. 4956, 298 A.C.W.S. (3d) 713 | (Alta. C.A., Oct 3, 2018)

2018 ABQB 571
Alberta Court of Queen's Bench

Weatherford Canada Partnership v. Addie

2018 CarswellAlta 1501, 2018 ABQB 571, [2018] A.W.L.D. 4135, [2018] A.W.L.D. 4136, 26 C.P.C. (8th) 311, 297 A.C.W.S. (3d) 51, 75 Alta. L.R. (6th) 248

Weatherford Canada Partnership (Plaintiff / Respondent) and Dave Addie, David Anderson, Glen Kinnee, Ted Harland, Dan Endersby, Midfield Supply ULC, Midfield Supply International Ltd., Dale Denney, Douglas Golledge, John Letwinetz, Rick Endersby, Jakob Ambrosius, Artemis Kautschuk und Kunstoff-Technik GmbH, Wilhelm Kaechele GmbH, West Met Tools & Machinery Ltd., and Europump Systems Inc. (Defendants / Applicants)

D.L. Shelley J.

Heard: May 25, 2018
Judgment: July 31, 2018
Docket: Edmonton 0603-04628

Proceedings: additional reasons to *Weatherford Canada Partnership v. Addie* (2016), 2016 CarswellAlta 617, 2016 ABQB 188, J.B. Veit J. (Alta. Q.B.); affirmed *Weatherford Canada Partnership v. Kautschuk* (2017), 2017 ABCA 110, 2017 CarswellAlta 576, Brian O'Ferrall J.A., Ronald Berger J.A., Sheilah Martin J.A. (Alta. C.A.); leave to appeal refused *Weatherford Canada Partnership v. Artemis Kautschuk und Kunstoff-Technik GmbH, et al.* (2017), 2017 CarswellAlta 2550, 2017 CarswellAlta 2549, Abella J., Brown J., Côté J., Gascon J., Karakatsanis J., McLachlin C.J.C., Moldaver J., Rowe J., Wagner J. (S.C.C.); leave to appeal allowed *Weatherford Canada Partnership v. Artemis Kautschuk Und Kunstoff-Technik Gmbh* (2018), 2018 ABCA 323, 2018 CarswellAlta 2138, Jack Watson J.A. (Alta. C.A.)

Counsel: Kenneth Fitz for Applicant, Artemis Kautschuk and Kunstoff-Technik GmbH
Sylvia Jacob for Applicant, Wilhelm Kaechele GmbH
Fausto Franceschi, Ward Hanson, Simon Elzen-Hoskyn for Respondent, Weatherford Canada Partnership

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
XXIV Costs
XXIV.7 Particular orders as to costs
XXIV.7.e Costs on solicitor and client basis
XXIV.7.e.ii Grounds for awarding
XXIV.7.e.ii.B Misconduct

Civil practice and procedure
XXIV Costs
XXIV.9 Particular items of costs

XXIV.9.j Miscellaneous

Headnote

Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and client basis — Grounds for awarding — Misconduct
Plaintiff W Inc. brought action against former employees who started competing company, and amended their statement of claim to include two German companies A and K, which were its own suppliers — W Inc. declared certain material and relevant documents were privileged for years into litigation — Once documents were disclosed A and K were able to bring successful application for summary judgment against W Inc. on grounds that action was limitation barred — W Inc.'s appeal was dismissed and Supreme Court of Canada refused to hear matter — A and K brought application for costs — Application granted — Multiple of Column 5 taxable costs was appropriate manner of determining costs — For period from commencement of lawsuit to date that withheld records were disclosed W Inc. was required to pay costs based on Column 5 of Schedule C using multiplier of four — From date of disclosure to conclusion of lawsuit, costs were to be paid based on Column 5 of Schedule C with multiplier of 2.5 — If withheld records had been disclosed at outset, dismissal application and appeal would likely have been required anyway — W Inc.'s actions engaged in A and K having to defend complex and high-risk lawsuit for ten years — W Inc. was sophisticated business litigant who appeared to have made intentional and strategic decisions to delay litigation until it could copy A and K's products for its own profit — It ought to have been clear to W Inc. that action could not be maintained against A and K — W Inc.'s conduct was misconduct as they either erroneously or improperly claimed privilege and strategically delayed commencing action against A and K to maximize its own long-term benefit — Given duration, complexity, amount claimed by W. Inc. and presence of some misconduct, application of Schedule C, Column 5 fees would be inadequate — Percentage of W Inc.'s solicitor-client costs would not be appropriate, given that solicitor-client costs had not been taxed and that such taxation would undoubtedly entail considerable time and additional expense — Costs incurred by A and K were not to be reduced on basis that counsel for other defendants might have spent more time asking questions or making submissions — It was not appropriate to reduce costs on basis that A and K played lesser role in parts of litigation — A and K were required to prepare and attend at sessions to prepare their defence against significant claim — It was reasonable for K to use foreign legal counsel as it was German company.

Civil practice and procedure --- Costs — Particular items of costs — Miscellaneous
Foreign counsel — Plaintiff W Inc. brought action against former employees who started competing company, and amended their statement of claim to include two German companies A and K, which were its own suppliers — W Inc. declared certain material and relevant documents were privileged for years into litigation — Once documents were disclosed A and K were able to bring successful application for summary judgment against W Inc. on grounds that their action was limitation barred — W Inc.'s appeal was dismissed and Supreme Court of Canada refused to hear matter — A and K brought application for costs — Application granted — Multiple of Column 5 taxable costs was appropriate manner of determining costs — It was reasonable for K to use foreign legal counsel as it was German company and it hired bilingual lawyer from German-based law firm to understand procedural and legal aspects of Canadian litigation and to overcome linguistic and cultural barriers — K was entitled to recover additional costs as long as they were reasonable.

Table of Authorities

Cases considered by *D.L. Shelley J.*:

Angle v. LaPierre (2006), 2006 ABQB 380, 2006 CarswellAlta 654, 392 A.R. 74 (Alta. Q.B.) — considered

Apotex Inc. v. Egis Pharmaceuticals (1991), 4 O.R. (3d) 321, 37 C.P.R. (3d) 335, 1991 CarswellOnt 3149 (Ont. S.C.J.) — considered

Blaze Energy Ltd. v. Imperial Oil Resources (2014), 2014 ABQB 509, 2014 CarswellAlta 1498 (Alta. Q.B.) — considered

Boyd v. JBS Foods Canada Inc. (2015), 2015 ABCA 191, 2015 CarswellAlta 1002, 72 C.P.C. (7th) 225, 20 Alta. L.R. (6th) 396, 602 A.R. 84, 647 W.A.C. 84 (Alta. C.A.) — considered

Refco Alberta Inc. v. Nipsco Energy Services Inc. (2003), 2003 ABCA 125, 2003 CarswellAlta 527, 327 A.R. 345, 296 W.A.C. 345 (Alta. C.A.) — considered

S. (K.) (Litigation representative of) v. Willox (2016), 2016 ABQB 654, 2016 CarswellAlta 2238, 32 C.C.L.T. (4th) 215 (Alta. Q.B.) — considered

Stagg v. Condominium Plan 882-2999 (2013), 2013 ABQB 684, 2013 CarswellAlta 2393, (sub nom. *Stagg v. Owners-Condominium Plan No. 882-2999)* 574 A.R. 363, 3 Alta. L.R. (6th) 219 (Alta. Q.B.) — considered

Stewart Estate v. 1088294 Alberta Ltd. (2016), 2016 ABCA 144, 2016 CarswellAlta 820, 35 Alta. L.R. (6th) 1, [2016] 9 W.W.R. 230 (Alta. C.A.) — considered

Stewart Estate v. TAQA North Ltd. (2013), 2013 ABQB 691, 2013 CarswellAlta 2414, 92 Alta. L.R. (5th) 141, 576 A.R. 57 (Alta. Q.B.) — referred to

Trizec Equities Ltd. v. Ellis-Don Management Services Ltd. (1999), 251 A.R. 101, 1999 ABQB 801, 1999 CarswellAlta 1469 (Alta. Q.B.) — considered

Walsh v. Mobil Oil Canada (2008), 2008 ABCA 268, 2008 CarswellAlta 1168, 2008 C.L.L.C. 230-033, 94 Alta. L.R. (4th) 209, 296 D.L.R. (4th) 178, [2008] 11 W.W.R. 205, 69 C.C.E.L. (3d) 1, 440 A.R. 199, 438 W.A.C. 199, 64 C.H.R.R. D/84 (Alta. C.A.) — considered

Waterous Investments Inc. v. Liberton Holdings Ltd. (1996), 183 A.R. 229, 1996 CarswellAlta 303 (Alta. Q.B.) — considered

Weatherford Canada Partnership v. Kautschuk (2017), 2017 ABCA 110, 2017 CarswellAlta 576 (Alta. C.A.) — referred to

Statutes considered:

Limitations Act, R.S.A. 2000, c. L-12
Generally — referred to

Tariffs considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Sched. C — referred to

Sched. C, Tariff of Costs, column 1 — referred to

Sched. C, Tariff of Costs, column 3 — referred to

Sched. C, Tariff of Costs, column 4 — referred to

Sched. C, Tariff of Costs, column 5 — referred to

APPLICATION for ruling on costs, additional reasons to judgment reported at *Weatherford Canada Partnership v. Addie* (2016), 2016 ABQB 188, 2016 CarswellAlta 617 (Alta. Q.B.).

***D.L. Shelley J.*:**

I. Background

1 Prior written reasons for decisions issued by this Court and by the Court of Appeal provide considerable background in relation to this lawsuit. For the purposes of this application and these reasons, however, it is not necessary to reiterate what was contained in those prior decisions and I will therefore restrict details to those that are pertinent to the issues raised in this application.

2 Weatherford is a company that manufactures and sells progressive cavity pumps. Weatherford purchased stators — necessary components of these pumps — from two German companies, Artemis and Kaechele. In April 2006, after some of Weatherford's former employees started a competing company, Weatherford commenced an action against several defendants involved in the creation of that competing company. Weatherford amended its statement of claim in April 2008 to include both Artemis and Kaechele as defendants.

3 Artemis and Kaechele successfully applied for summary judgment against Weatherford in 2016 on the grounds that Weatherford's action was limitation barred (*Weatherford Canada Partnership v. Addie*, 2016 ABQB 188 (Alta. Q.B.)). The Court of Appeal dismissed Weatherford's appeal (*Weatherford Canada Partnership v. Kautschuk*, 2017 ABCA 110 (Alta. C.A.)). Leave to appeal was denied by the Supreme Court of Canada on November 30, 2017. Artemis and Kaechele have now applied to recover their litigation costs.

II. Issue

4 The main issue before me is the quantum of costs which ought to be awarded to the successful parties, Artemis and Kaechele.

5 In determining the answer to this issue, I will address the various methods which have been employed in this province to calculate an appropriate costs award. These include a percentage indemnification, a multiple of Schedule C costs, and a hybrid approach.

6 In making this determination I will also have regard to the complexity and duration of the litigation, the remedy sought against Artemis and Kaechele, and Weatherford's conduct during the litigation.

III. The Parties' Positions

A. Artemis' Position

7 Artemis submits that it should receive a costs award in the range of 75% indemnity of its solicitor-client fees plus disbursements and GST (totalling $1,059,303), for an award of $831,603.

8 Artemis argues that, while a costs award is generally 40-50% of solicitor-client costs for complex and protracted litigation, in this case it is entitled to an increase in indemnification for misconduct and aggravating factors. Artemis argues that the following factors weigh in favour of 75% indemnification:

1. The litigation was especially complex and protracted;

2. Artemis faced a significant litigation risk, given that Weatherford claimed

damages of approximately $290,000,000 on a joint and several basis;

3. Weatherford improperly asserted privilege over records that Weatherford should have disclosed at the outset of the litigation. Weatherford therefore unnecessarily increased the complexity, length, and expense of the litigation;

4. The litigation would have been shorter and less expensive had Weatherford disclosed records over which it claimed privilege (the Withheld Records) — which formed the basis upon which Artemis applied for summary judgment — at an earlier time; and

3. Kaechele's claimed costs are $440,920.10 greater than those claimed by Artemis. Since the parties faced the same challenges in the litigation, their costs should not differ;

4. Artemis and Kaechele failed to set out their unaltered single Column 5 costs, which the Court needs in order to have a neutral baseline;

5. Artemis and Kaechele over-claimed costs associated with specific items in their bills of costs; and

6. Kaechele claims the entirety of the costs incurred for its legal counsel's flights and accommodations, which is unreasonable.

IV. Authorities Relied On

A. Costs Awards Depend on Complexity and Duration of the Litigation, Party Misconduct, and/or the Remedy Sought in the Litigation

i. Full Indemnity or Solicitor-Client Costs

23 In *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, 1998 ABCA 118 (Alta. C.A.), the unsuccessful respondent (the original plaintiff) had sued the appellant for $55.7 million for interfering with the respondent's business. The litigation was complex and spanned over 15 years. The Court of Appeal granted the appellant party and party costs and determined the costs award by cross-referencing Schedule C fees with the appellant's solicitor-client bill, with adjustments for inflation. The Court noted that costs awards may be calculated in various ways when Schedule C fees are inadequate, including the use of "[a] higher column, multiples of a column, a multiplier for inflation or otherwise, extra lump sums, some fraction of solicitor-client costs, and so forth" (para 4). The Court stated that "[t]he ultimate question is whether the final total is reasonable or not" (para 4).

24 In *Jackson v. Trimac Industries Ltd.* (1993), 138 A.R. 161, 1993 CarswellAlta 310 (Alta. Q.B.), aff'd 1994 ABCA 199 (Alta. C.A.), Justice Hutchinson awarded costs on an indemnity basis ("solicitor and his own client costs") to a partially successful plaintiff in his action against a former employer and a senior executive. The plaintiff had initially sought damages of more than $25 million, alleging wrongful dismissal, breach of an option agreement, breach of a shareholders agreement, and inducement of breach of contract (*Jackson v. Trimac Industries Ltd.* (1992), 134 A.R. 321, 1992 CarswellAlta 184 (Alta. Q.B.) at para 2). The defendants' misconduct included a calculated decision "to force [the plaintiff] to exhaust the legal proceedings to obtain that which was obviously his," giving unreliable evidence, and inducing a breach of contract (cite from *Jackson 1992* at 81).

25 Justice Hutchinson stated that, to award costs on a solicitor-client basis, "the court must conclude that the case fits within the parameters of a rare and exceptional or unusual case" (para 28). Such rare circumstances arise where there is "an attempt to deceive the court and defeat justice, . . . where [parties] were guilty of positive misconduct [and] where others should be deterred from like conduct,... fraudulent conduct," or "an attempt to delay proceedings" (paras 32-37).

26 The applicants in *Stagg v. Condominium Plan 882-2999*, 2013 ABQB 684 (Alta. Q.B.), sought costs after receiving a Consent Order which directed that the respondent condominium corporation repay a deposit of $14,527. The applicants had paid the deposit on behalf of the respondent and the respondent refused to repay the deposit for over two years. The respondent's misconduct included "an attempt to hinder and delay the litigation, requiring the plaintiff to prove facts that should have been admitted, and failure to produce material documents in a timely fashion" (para 44). Ultimately, Justice Tilleman awarded the applicant full indemnification of costs to deter others from adopting similar conduct. Justice Tilleman noted that "this is not a case where the [respondent] asserted in good faith a legal position through established legal procedures, which legal position turned out to be erroneous" (para 63). This suggests that a good faith legal position may influence a court's finding as to the significance of a party's misconduct.

27 In *Max Sonnenberg Inc. v. Stewart, Smith (Canada) Ltd.* (1986), 48 Alta. L.R. (2d) 367 (Alta. Q.B.), 1986 CanLII 1771, the plaintiff sought costs after succeeding in its action to recover damages associated with the loss of its helicopter.

Justice Veit found that the defendants engaged in serious misconduct by knowingly filing a fraudulent proof of loss in an attempt to recover insurance proceeds to which the plaintiff was entitled, negligently failing to consult their files, and delaying the production of "extremely material" records. Justice Veit awarded costs to the plaintiff on an indemnity basis.

28 In *Brown v. Silvera*, 2010 ABQB 224 (Alta. Q.B.), the applicant, Silvera, applied for solicitor and own client costs (full indemnity) on the basis of the respondent's misconduct, or alternatively, because a matrimonial property agreement provided for full indemnity of costs. Justice Moen had earlier awarded the applicant approximately $15.1 million after a long trial and protracted litigation over the division of matrimonial property. Justice Moen determined that the respondent's misconduct, in and of itself, entitled Silvera to full indemnity of her costs. The respondent had deceived and mislead the applicant on financial circumstances and asset values, failed to appear at questionings, and refused to produce relevant documents. Justice Moen noted that the dispute "was not an honest difference between the parties but rather an attempt by [the respondent] to keep Silvera from what was rightfully hers" (para 44).

29 In *College of Physicians & Surgeons (Alberta) v. H. (J.)*, 2009 ABQB 48 (Alta. Q.B.), Justice Graesser considered the appropriateness of an award for full indemnification of costs after the College of Physicians and Surgeons (the respondent) successfully opposed an application to bar a doctor from continuing his role as an investigator of complaints for the College. Justice Graesser found that the applicants had engaged in serious misconduct during the litigation. They had attacked the credibility and integrity of the College's investigator and made baseless and unfounded allegations of dishonesty and fraud. Justice Graesser held that a full indemnity of legal costs was justified in order to discourage allegations of bias and dishonesty where no reasonable basis existed to support those allegations.

30 In the case of *Cooper v. Cooper*, 2013 ABQB 117 (Alta. Q.B.), the plaintiff had sought recovery of his share of pension benefits, which totalled $56,000. The respondent refused to divide the pension benefits or to provide information on those benefits for three years, forcing the plaintiff to sue the respondent to recover the proceeds. The respondent acted fraudulently and in breach of trust by converting pension benefits into her own name and then intentionally delaying and hindering the plaintiff from obtaining the proceeds. The Court found that this misconduct fell within the parameters set out in *Jackson* for justifying an award of solicitor-client costs. The Court awarded $15,000 in solicitor-client costs plus reasonable disbursements, which amounted to approximately 54% indemnity of costs.

31 In *Boyd v. JBS Foods Canada Inc.*, 2015 ABCA 191 (Alta. C.A.), the respondent employee had unsuccessfully applied to summarily dismiss his employer's appeal because the employer's counsel took no active part in the judicial review proceeding in the Court of Queen's Bench. In determining costs for that application, the Court of Appeal stated that "[f]ull-indemnity costs are reserved for serious situations, such as bad misconduct, or certain exceptional circumstances," and that the misconduct in this case did not rise to that level (para 3). The Court nevertheless awarded the successful appellant enhanced party and party costs under Column 4 of Schedule C, rather than Column 1, because the parties' arguments were complex and because the appellant's argument was unfounded and unfair.

32 In *Walsh v. Mobil Oil Canada*, 2008 ABCA 268 (Alta. C.A.), the respondent had originally alleged discrimination against her former employer. A human rights panel dismissed her claim, but she successfully appealed to the Court of Queen's Bench. She was again successful at the Court of Appeal except that a majority of the Court found that the trial judge erred by awarding her solicitor-client costs. The Court of Appeal confirmed that courts will generally only award solicitor-client costs in rare occasions where a party shows reprehensible, scandalous, or outrageous conduct. The majority of the Court found that, to justify solicitor-client costs, the misconduct must have occurred during the course of the litigation, and in this case, it did not.

ii. Percentage of Complete Indemnity Costs

33 In *Trizec Equities Ltd. v. Ellis-Don Management Services Ltd.*, 1999 ABQB 801 (Alta. Q.B.), Justice Mason stated the general rule for costs awards, which is that, in the absence of "any misconduct on the part of the litigants . . . to award costs on a party and party basis" (para 20). In Alberta, this means that courts will generally award costs to "achieve indemnity in the range of 40% to 50%" (para 21). However, Justice Mason noted further that Schedule C is meant for the "common stream of litigation," and not for "complex and protracted litigation" (para 27). He stated that, when Schedule C does not provide an appropriate level of costs, such as cases that involve long and complex trials, a percentage of indemnity approach makes more sense than applying a multiplier to Schedule C fees. Applying these principles, Justice Mason awarded the successful

defendants 60% of their solicitor-client costs. The enhanced costs award was justified because the plaintiff had sued the defendants for $20 million in damages, the litigation was complex and involved a 145-day trial, and the plaintiff engaged in misconduct by strategically seeking recovery from defendants who lacked adequate insurance coverage.

34 In *LSI Logic Corp. of Canada Inc. v. Logani*, 2001 ABQB 968 (Alta. Q.B.), the Court applied the percent of indemnity approach to determine costs. Because of the plaintiffs' "gloss of impropriety," the Court awarded LSI Canada "2/3 [or 66%] of its solicitor and client costs" (para 16, 23). The Court had dismissed the plaintiff shareholders' application to strike fair value proceedings, which it found was an abuse of process and struck the plaintiffs' statement of claim that alleged oppression against the defendant, LSI Canada. The litigation was moderately complex and lengthy and LSI Canada faced substantial economic risk because the plaintiffs sought $40 million of damages in their oppression action. The plaintiffs had "breached the implied undertaking under Alberta law not to use information disclosed in the fair value proceedings for a collateral purpose, as well as their express contractual undertaking not to use information disclosed in the fair value proceedings in any other litigation" (para 18).

35 Notably, the Court in *LSI Logic* dismissed the plaintiffs' claim that LSI Canada's actual costs were unreasonably high, noting that "a party that is sued 'is not expected to shop for cheaper services but is entitled to be represented by counsel of its choice'" (at para 15, citing *Apotex Inc. v. Egis Pharmaceuticals* (1991), 4 O.R. (3d) 321 (Ont. S.C.J.) at 323, 1991 CanLII 2729). The Court awarded LSI Canada's directors and officers 1/3 [or 33%] of their solicitor and client costs, citing their minimal participation in the litigation as the reason for the lower costs award.

iii. Multipliers Applied to Schedule C to Determine Costs

36 The successful appellants in *Stewart Estate v. 1088294 Alberta Ltd.*, 2016 ABCA 144 (Alta. C.A.) applied for costs after 10 years of complex litigation that involved trial and an appeal against five respondents. In the respondents' initial action disputing the interpretation of several oil and gas leases, the respondents sought damages of $31.5 million (*Stewart Estate v. TAQA North Ltd.*, 2013 ABQB 691 (Alta. Q.B.)). There was no indication of misconduct and the appellants bested a formal offer for settlement as well as three informal offers. Ultimately, the Court of Appeal applied a multiplier of two to Schedule C, Column 5 tariffs to determine the appellants' costs award. The Court noted that the "[a]pplication of a multiplier is not unprecedented when the trial is long and complex and the quantum of damages claimed is significantly greater than $1.5 million" (para 24). The Court stated further that "Alberta courts have typically awarded a multiplier of the tariffs in Column 5 in three circumstances: when the complexity of the action warrants it, when the amount in dispute significantly exceeds the $1.5 million threshold for Column 5 or when the conduct of one of the parties warranted a multiplier" (para 25).

37 In *Blaze Energy Ltd. v. Imperial Oil Resources*, 2014 ABQB 509 (Alta. Q.B.), Justice Schutz (as she then was) considered costs where the unsuccessful plaintiff claimed rights of first refusal with respect to oil and gas interests. The plaintiff had sought specific performance, which would have interfered with transactions worth a combined $968 million. Justice Schutz awarded costs against the plaintiff in the amount of 1.5 times the Schedule C, Column 5 tariffs based on the "importance of the outcome to [the] parties and the amount of money potentially involved" (para 81). She refused to apply a larger multiplier or to order a percentage of indemnity for solicitor-client costs because the litigation was neither complex, nor protracted, and the plaintiff did not engage in any serious misconduct. Justice Schutz noted further that widespread adoption of the percentage of indemnity approach to awarding costs "would undermine policy objectives, including the facilitation of access to justice, which underlined the adoption of a tariff approach to costs" (para 75).

38 The appellant in *RVB Managements Ltd. v. Rocky Mountain House (Town)*, 2015 ABCA 304 (Alta. C.A.), had sought damages of $2.5 million against the respondent for illegal diversion of water. The appellant amended its claim during the litigation to seek $25 million in damages. The claim failed at trial and the Court of Appeal dismissed the appeal. Altogether, the litigation involved a 27-day trial, multiple amendments to the pleadings, expert testimony, and extensive documentation. Neither party engaged in misconduct. In terms of costs, the Court of Appeal affirmed the trial judge's decision to apply a multiplier of two to costs that arose after the appellant increased its claim for damages from $2.5 million to $25 million.

39 In *S. (K.) (Litigation representative of) v. Willox*, 2016 ABQB 654 (Alta. Q.B.), the plaintiff had unsuccessfully claimed damages for negligence in an amount "over five times the Column 5 threshold" from the defendant physicians. The litigation was complex, as it involved multiple issues impacting both liability and quantum, multiple experts, five weeks of trial, and written arguments. The plaintiff did not engage in misconduct. Justice Moreau (as she then was) applied a multiplier

of two to the Column 5 tariffs to determine the costs award against the plaintiff.

40 In *Klemke Mining Corp. v. Shell Canada Ltd.*, 2007 ABQB 427 (Alta. Q.B.), the plaintiff successfully sued in breach of contract and received $22 million in damages. The Court found that the litigation was lengthy and complex, although not as complex as in *Trizec*, and that no misconduct could be inferred. The Court applied a multiplier of two to the Column 5 tariffs to determine the costs award. The Court then compared that costs award to the plaintiff's total solicitor-client costs to find the percentage of indemnification that the award would provide — 40% — and found that the award provided adequate compensation. Additionally, the Court noted that the solicitor client bill had not been taxed, so the comparative measure (ie of comparing costs determined with the use of a multiplier to a percentage of indemnity) was "less weighty" than if the solicitor client bill had been taxed (para 28).

41 In *Marathon Canada Ltd. v. Enron Canada Corp.*, 2008 ABQB 770 (Alta. Q.B.), the plaintiff succeeded in its claim against Enron for damages of $560,000 and successfully defended Enron's counterclaim for damages of $126 million. The litigation involved numerous complicated pleadings, the exchange of 21 Affidavits of Records, total production that exceeded 15,000 pages, and substantial written arguments. There was no party misconduct. Ultimately, Justice McMahon decided that the "better approach" for determining a costs award was to apply a multiplier to Schedule C fees, rather than applying a percentage of indemnity to reasonable solicitor and own client costs. Justice McMahon applied a multiplier of three to the Column 5 tariffs to determine the costs award based on the following factors in the case: "duration, the sum claimed, the number of experts, the number of documents produced and the complexity of the issues": (para 35).

42 The appellant in *Hill v. Hill*, 2013 ABCA 313 (Alta. C.A.) had originally claimed a 1/4 interest in a business with assets valued at $70 million, plus disgorgement of profits for a period of over 30 years. The Court of Queen's Bench dismissed his action and awarded costs to the respondent (*Hill v. Hill*, 2012 ABQB 694 (Alta. Q.B.)). The litigation spanned seven and a half years and involved 38 motions and case management meetings, five appeals or motions filed in the Court of Appeal, the production of over 15,000 pages of documentation, and 23 days of trial. The Court of Appeal noted that the appellant lengthened and delayed the litigation with "ever-evolving claims," wasteful motions, and by making unfounded allegations of misconduct against the respondents (para 14). The Court of Appeal upheld the trial judge's decision to award the respondent costs calculated by applying a multiplier of four to Column 5 tariffs for the period up to the close of the appellant's case at trial. The Court allowed the respondents' cross appeal with regard to the period after the closing of the appellant's case at trial and increased the costs for that period to triple Column 5 costs because of the litigation's complexity and the appellant's "incessant misconduct" (para 52).

43 In *Chernetz v. Eagle Copters Ltd.*, 2003 ABQB 771 (Alta. Q.B.), the plaintiff had sued the defendant helicopter and engine manufacturers after her husband died in a helicopter crash. The plaintiff successfully applied for the production of records over which the defendants had previously asserted privilege. The Court awarded the plaintiff her single Column 5 costs plus reasonable disbursements for the application. Notably, the Court awarded costs to the plaintiff despite there being no evidence that the defendants had asserted privilege in bad faith. As noted by the Court: "[b]ecause of [the] reliance upon full and proper disclosure, a litigant must be particularly diligent in record production and in claims to privilege" (para 7). Further, "[t]o put it briefly, he who claims privilege had best be right if he wishes costs" (para 12).

iv. Hybrid or Alternative Approaches to Costs

44 The defendant in *Polar Ice Express Inc. v. Arctic Glacier Inc.*, 2009 ABCA 20 (Alta. C.A.), unsuccessfully appealed a judgment in favour of the plaintiff for $50,000 damages for interfering wrongly with economic relations and inducing breach of contract. The Court of Appeal found that the defendant had engaged in misconduct by improperly refusing to produce material records and that the defendant's employee and witness had lied under oath. Therefore, the Court ordered that costs be awarded on a full indemnity basis from the first day of trial onwards, and on a party and party basis for all expenses incurred before trial.

45 In *Kent v. Martin*, 2017 ABQB 27 (Alta. Q.B.), var'd 2018 ABCA 202 (Alta. C.A.), Justice Strekaf (as she then was) considered the appropriateness of a costs award for a partially successful plaintiff who had originally sought $10.5 million in damages in his defamation actions. The litigation was moderately complex and it extended over eight years. The litigation was also highly contentious and both parties contributed to delays and unnecessary expenses associated with a five week trial and 39 pre-trial court appearances and applications. The defendants engaged in misconduct that included the "intentional

strategic decision to conceal that they were advancing a claim for journalist-source privilege" (para 36). Justice Strekaf awarded $250,000 in costs to the plaintiff based on Schedule C, Column 3 fees, "adjusted upwards to reflect the results and complexity of the proceedings" (para 76).

46 On appeal, the Court of Appeal awarded the plaintiff an additional $200,000 in costs to account for the "seriousness of the [defendants' misconduct] and the need to discourage it" (para 42). The Court found that the defendants' failure to produce highly relevant emails, made worse by altering the emails before producing them, "represented a fundamental breach of the defendants' obligations" (para 33).

B. Courts May Apportion Costs Based on Party Involvement

47 In *Angle v. LaPierre*, 2006 ABQB 380 (Alta. Q.B.), multiple plaintiffs succeeded in their defamation actions against multiple defendants, and the Court attributed costs amongst the defendants. The Court determined that this differential attribution was necessary because the plaintiffs achieved varied degrees of success in their claims. Each defendant was liable for paying Schedule C costs according to the percentage of total trial time attributed to the proceedings against each defendant. The Court stated that this approach fit with the "notion that costs reflect effort" (para 38).

48 In *HSBC Bank Canada v. Lourenco*, 2012 ABQB 648 (Alta. Q.B.), Justice Goss considered costs after finding two defendants liable for knowingly assisting and directing a company, Triple J, in fraudulent and dishonest breach of trust. Justice Goss found that the plaintiff was entitled to solicitor-client costs according to terms in Triple J's General Security Agreement with the plaintiff. Justice Goss apportioned the costs between the defendants on a 75/25% split because of the defendants' "differing involvement in and for this litigation" (para 70).

49 As noted above, the Court in *LSI Logic* also apportioned costs, awarding the successful corporate defendant 66% of its total costs, and the other defendants 33% of their costs because they had participated in the litigation to a lesser extent.

C. Courts May Allow Disbursements for Legal Counsel from Other Jurisdictions

50 In *Waterous Investments Inc. v. Liberton Holdings Ltd.* (1996), 183 A.R. 229, 1996 CarswellAlta 303 (Alta. Q.B.), the successful plaintiff sought to recover travel disbursements incurred because it used legal counsel in Calgary for a trial in Edmonton. Justice Veit stated that "[t]he test by which the choice of lawyers is to be assessed for costs purposes is whether the choice made by the litigant was reasonable" (para 28). Here, while the litigation did not require any specific expertise, the plaintiff was an Ontario corporation who had always used the same legal representation in Alberta. The plaintiff's business activities in St. Albert were likely to spread across the province, and the outcome of the litigation was likely to impact the plaintiff's business throughout Alberta. Therefore, Justice Veit found that it was reasonable for the plaintiff to use its Calgary lawyers to act on its behalf and that travel costs were recoverable.

51 In *Refco Alberta Inc. v. Nipsco Energy Services Inc.*, 2003 ABCA 125 (Alta. C.A.), the successful respondents sought a costs award that included the recovery of travel and accommodation costs incurred by counsel who had travelled from Edmonton to Calgary to argue the appeal. The Court of Appeal granted the travel and accommodation costs, adding to Justice Veit's analysis from *Waterous Investments* the principle that "[t]he competency of counsel must be viewed with some deference through the eyes of the client. Trust and confidence must surround competence in a healthy and sustainable solicitor-client relationship" (para 16). However, the Court of Appeal also noted that its decision was "influenced by the amount requested," which in this case was only $500 (para 17).

52 The Court in *Petrogas Processing Ltd. v. Westcoast Transmission Co.*, [1990] 4 W.W.R. 461, 1990 CarswellAlta 51 (Alta. Q.B.) awarded costs to the defendant after they successfully defended the plaintiff's contractual claim for $224.6 million. The Court ordered full indemnity of costs because government regulation outside of the parties' control justified doing so and because an agreement between the parties allowed for full indemnification. The Court also awarded the Vancouver-based defendant the transportation and accommodation costs associated with having to meet with its Calgary-based legal counsel in both Calgary and Vancouver during the litigation. On this issue, the Court stated that "[t]he question is whether the expense was reasonable and proper in the light of the circumstances which existed at the time it was incurred" (para 56).

53 In *Caterpillar Tractor*, the Court of Appeal ordered that the unsuccessful respondent pay for a disbursement related to the travel and lodging expenses that the appellant paid to the representative of the appellant's parent company to attend trial. The Court allowed the disbursement because it was reasonable for the appellant, who was a large foreign corporation, to have a representative present to consult with and instruct legal counsel.

D. Conclusion Regarding the Common Approach

54 The general rule is that costs should be awarded on a party and party basis and that, absent misconduct, the amount awarded should approximate 40-50% indemnity of a winning party's actual costs (*Marathon* at para 30; *Trizec* at para 21; *LSI Logic* at para 8). Courts may elevate costs to the upper end of that general range and above where the losing party engages in misconduct, when the litigation is particularly long and complex, and when the amount in dispute is significant (*Trizec* at paras 30-32; *LSI Logic* at paras 8, 10, 16; *Marathon* at paras 35-36; *Stewart* at para 25).

55 Alberta courts have recognized that when Schedule C fees are inadequate, courts may use several different methods for determining appropriate costs, including the application of multipliers to a column, extra lump sums, or some fraction of solicitor-client costs (*Caterpillar Tractor* at para 4; *LSI Logic* at para 7). The ultimate question is "whether the final total [reached] is reasonable or not" (*Caterpillar Tractor* at para 4).

56 As the Court of Appeal recently stated, the "[a]pplication of a multiplier is not unprecedented when the trial is long and complex and the quantum of damages claimed is significantly greater than $1.5 million" (*Stewart Estate* at para 24). In fact, Alberta courts have often determined costs awards by applying multipliers to Schedule C fees where a party has engaged in misconduct, the litigation was long and complex, or the quantum sought in the original action was significant (see e.g. *Stewart Estate* at para 25; *RVB Managements* at para 3-4, 13; *Willox* at para 30; *Klemke* at paras 41-42; *Marathon* at paras 35-36; *Hill (ABCA)* at paras 39, 60-61 *Blaze* at paras 80-81).

57 In some cases, courts have avoided using the percentage of indemnity approach on the basis that doing so would undermine policy objectives such as facilitating access to justice (*Blaze* at para 75), or because solicitor-client costs may include items not relevant to party and party costs (*Marathon* at para 31) and not clearly "reasonable and appropriately incurred to advance the issues in the action" (*Kent (ABQB)* at para 62). However, courts may first apply a multiplier to Schedule C fees, and then check the appropriateness of the resulting award by calculating the percentage of indemnity that the award provides to the successful party (*Klemke* at paras 28, 41-42).

V. Analysis

A. Reduction Based on Apportionment

58 Weatherford provided a case in which the Court apportioned costs amongst unsuccessful parties who were parties to the same costs application. However, this case is different, given that the other defendants in Weatherford's action are not parties to this application and occupy very different roles in the litigation compared to Artemis and Kaechele.

59 I am satisfied that Artemis and Kaechele were required to attend the numerous and lengthy Questioning sessions, since they were facing a claim of $290 million. Counsel for other defendants may have assumed a greater role in the actual questioning of witnesses, but counsel for Artemis and Kaechele were still required to prepare for and attend Questioning in order to prepare their defence to the claim. The same can be said of other steps in the litigation, such as interim applications. While other defendants' counsel may have made their submissions first, and therefore taken up more of the application time, it was still necessary for Artemis' and Kaechele's counsel to prepare for and attend these applications, and often to add to the submissions of other counsel.

60 Accordingly, I conclude that the costs incurred by Artemis and Kaechele ought not to be reduced on the basis that counsel for other defendants may have spent more time asking questions or making submissions. It is not appropriate in this case to reduce costs on the basis that Artemis and Kaechele played a lesser role in parts of the litigation. I suspect that the costs incurred by the defendants who played a greater role likely reflect that difference. Costs should reflect effort (*Angle* at

para 38). Artemis and Kaechele had to vigorously defend themselves from a very significant claim. They ought not to have their costs reduced because other defendants also participated.

B. Use of Foreign Legal Counsel

61 A successful party may recover its reasonable costs associated with using legal counsel from another jurisdiction. Where the decision to use foreign counsel is reasonable in the circumstances, and the amounts claimed in costs are reasonable, the successful party should recover those costs (*Waterous Investments* at para 28; *Petrogas* at para 56; *Refco* at paras 16-17).

62 In this case, Kaechele is a German company that hired a bilingual lawyer from a German-based law firm to understand the procedural and legal aspects of Canadian litigation and to overcome linguistic and cultural barriers. This was a reasonable course of action. Kaechele should therefore recover these additional costs, provided the amounts claimed are reasonable.

63 During the course of the application, counsel for Kaechele confirmed that her firm did not charge any fees for reviewing the file when it was transferred to them. She also confirmed that fees and disbursements charged were incurred in relation to this lawsuit alone and did not include charges for other matters. She offered to provide Weatherford's counsel with back-up documentation in support of this position. Therefore, if Weatherford's counsel has not already acted on this offer, I direct that Weatherford's counsel request, and Kaechele's counsel provide, documentation in relation to the fees and disbursements that are questioned by Weatherford. If, following that review, there are any items in dispute, they are to be referred to the Review Officer for a determination of their reasonableness.

C. Appropriate Cost Awards in this Case

64 This litigation spanned over ten years. All of the parties describe the litigation as complex and contentious, involving the production of over 8,000 records, five contested chambers applications (and appeals of some of them), at least 24 case management conferences, and multiple amended pleadings. The stakes were high, given that Weatherford sought damages of $290 million on a joint and several basis.

65 A key question is whether, and to what extent, Weatherford's actions during the litigation fall within the exceptional circumstances where enhanced costs are justified to sanction a party's scandalous or outrageous conduct (see e.g. *Jackson (1993)* at para 28; *Stagg* at paras 44-46; *Cooper* at paras 12-13; *Walsh* at paras 112-113, 158-161). Where a party's error or mistake arises in good faith, this does not excuse the party of its liability for the opposing party's costs (*Chernetz* at paras 7, 12). A mistake made in good faith, however, may be considered as a factor that limits the extent to which a court will enhance costs (*Stagg* at para 63; *Brown* at para 44).

66 Weatherford asserted privilege over relevant and material records. Weatherford refused to produce those records until years into the litigation, after Artemis and Kaechele applied for production. Whether or not Weatherford asserted privilege in good faith, the assertion was at best an error. As stated by Justice McMahon in *Chernetz*, "he who claims privilege had best be right if he wishes costs" (para 12). Furthermore, the circumstances suggest that Weatherford's refusal to disclose records did not stem solely from a good faith belief that privilege applied. Weatherford is a sophisticated business litigant who appears to have made intentional and strategic decisions to delay the litigation until Weatherford could copy Artemis' and Kaechele's stator products for its own profit (see *Weatherford (2016 ABQB)* at paras 151-153; *Weatherford (2017 ABCA)* at para 36).

67 More importantly, the Withheld Records contained information that resulted in the successful dismissal of the Action on the basis of the *Limitations Act*. Once disclosed, it became clear to Artemis and Kaechele, and ultimately this Court and the Court of Appeal, that the Action was commenced after the expiration of the limitation period, following a conscious decision by Weatherford to delay commencement for business reasons. If it was obvious to Artemis, Kaechele, this Court and the Court of Appeal, it ought to have been clear to Weatherford that this Action could not be maintained against Artemis and Kaechele. But the Action was not discontinued, and Artemis and Kaechele were forced to seek dismissal of the action, and to defend the dismissal decision at the Court of Appeal and the leave application to the Supreme Court, in order to end a very lengthy and complex lawsuit that was commenced after the limitation period had expired.

68 Therefore, I would characterize Weatherford's conduct as misconduct in the sense that Weatherford, either erroneously or improperly, claimed privilege and strategically delayed commencing the Action against Artemis and Kaechele to maximize its own long term benefit. Similarly, I would characterize Weatherford's conduct as misconduct in the sense that it commenced and continued a lawsuit against Artemis and Kaechele when it had in its possession documents which made it clear that it had brought its action out of time. Weatherford's conduct did not involve fraud, a breach of trust, an abuse of process, breached undertakings, ever-evolving claims, or the making of baseless allegations of dishonesty and misconduct. However, there is an aspect of outrageousness, in that Weatherford commenced and continued a complex and expensive lawsuit against two parties when it was in possession of documents that should have alerted it to the fact that its time for doing so had expired. While Weatherford's conduct warrants deterrence, I would not place it on the upper end of the scale of misconduct that justifies an indemnity of costs, but conclude that enhanced costs aimed at deterring such conduct are warranted.

69 Given the duration of the litigation, its complexity, the amount claimed by Weatherford, and the presence of some misconduct, an application of Schedule C, Column 5 fees would be inadequate in this case. Weatherford itself acknowledges this, but disagrees with the magnitude of the enhancement which is warranted in these circumstances. I have concluded that a percentage of its solicitor-client costs is not appropriate, given that the solicitor-client costs have not been taxed and that such a taxation would undoubtedly entail considerable time and additional expense. I have therefore concluded that a multiple of Column 5 taxable costs is the appropriate manner of determining costs in this case.

70 Weatherford's failure to produce the highly relevant material records when it did not have a proper basis to do so resulted in Artemis and Kaechele having to defend a complex and high-risk lawsuit for ten years. I have concluded that for the period from commencement of the lawsuit to the date that the Withheld Records were disclosed, Weatherford ought to pay costs based on Column 5 of Schedule C using a multiplier of 4. From the date of disclosure to the conclusion of this lawsuit, the costs award should be reduced, since, had the Withheld Records been disclosed at the outset, the dismissal application and appeal would likely have been required in any event. From the date the Withheld Records were produced to Artemis and Kaechele, Weatherford shall pay costs based on Column 5 of Schedule C using a multiplier of 2 1/2.

71 As I mentioned earlier, at the hearing of the application there was some concern regarding the inclusion of certain entries on the proposed Bills of Costs produced by Artemis and Kaechele. Weatherford is to identify any remaining items that it disputes, and if the parties are unable to agree on a resolution in respect of those items within 60 days of receiving Weatherford's updated list of disputed items, the items shall be referred to the Review Officer for a determination. If any decisions required in respect of disputed items fall outside of the jurisdiction of the Review Officer, the parties may bring those matters before me for further determination. Should that become necessary, the parties are directed to contact my assistant for the purposes of arranging a time at which any disputed items may be addressed further.

Application granted.

TAB 10

2018 ABQB 999
Alberta Court of Queen's Bench

McAllister v. Calgary (City)

2018 CarswellAlta 2992, 2018 ABQB 999, [2019] A.W.L.D. 441, [2019] A.W.L.D. 442, [2019] A.W.L.D. 443, [2019] A.W.L.D. 444, [2019] A.W.L.D. 454, [2019] A.W.L.D. 558, 299 A.C.W.S. (3d) 272, 52 C.C.L.T. (4th) 38, 79 Alta. L.R. (6th) 58

Kyle Lyndon McAllister (Plaintiff) and The City of Calgary (Defendant)

J.C. Kubik J.

Heard: October 30, 2018
Judgment: December 10, 2018
Docket: Calgary 0701-07017

Proceedings: additional reasons to *McAllister v. Calgary (City)* (2018), 48 C.C.L.T. (4th) 132, 73 Alta. L.R. (6th) 310, 77 M.P.L.R. (5th) 270, 2018 CarswellAlta 1178, 2018 ABQB 480, J.C. Kubik J. (Alta. Q.B.)

Counsel: Trevor R. McDonald, Robert Martz, for Plaintiff
Colleen Sinclair, for Defendant

Subject: Civil Practice and Procedure; Torts

Related Abridgment Classifications

Civil practice and procedure
XXIV Costs
XXIV.9 Particular items of costs
XXIV.9.i Witness fees and expenses
XXIV.9.i.i Expert witness
XXIV.9.i.i.A Preparation of expert for trial

Torts
XVI Negligence
XVI.14 Practice and procedure
XVI.14.g Costs
XVI.14.g.iii Miscellaneous

Headnote

Torts --- Negligence — Practice and procedure — Costs — Miscellaneous
Pedestrian came to municipal light rail transit station to pick up passenger in early hours of January 1, 2007 — While attempting to walk on walkway from station parkade to station, pedestrian was assaulted by multiple assailants for almost 20 minutes — Pedestrian brought successful action against municipality for damages under Occupiers' Liability Act, and matter proceeded to trial on issue of liability — Parties made submissions on costs — Pedestrian was awarded costs in amount of $70,294.70, reflecting base costs of $47,950 grossed up by 46.60 per cent, plus additional disbursements agreed to by parties — It was not premature to award costs with respect to liability trial, as judgment had been entered and there was no good policy reason to defer costs award until damages were determined — Schedule C was appropriate measure of costs as there was no misconduct and matter was not overly complex — Column 3 costs were grossed up to approximate reasonable costs in 2018 for steps taken to bring matter to trial.

Civil practice and procedure --- Costs — Particular items of costs — Witness fees and expenses — Expert witness — Preparation of expert for trial
Pedestrian came to municipal light rail transit station to pick up passenger in early hours of January 1, 2007 — While attempting to walk on walkway from station parkade to station, pedestrian was assaulted by multiple assailants for almost 20 minutes — Pedestrian brought successful action against municipality for damages under Occupiers' Liability Act, and matter proceeded to trial on issue of liability — Parties made submissions on costs — Pedestrian was awarded expert's full fee account in amount of $117,941.53, minus adjustments for hotel expenses — It was reasonable for pedestrian to engage expert and his services were reasonable with respect to issues before court — Pedestrian's expert was qualified as expert in crime prevention through environmental design, while municipality's was not — While not all of expert's opinions were accepted, his testimony with respect to standard of care was necessary for pedestrian to meet burden of proof and was relied on by court to find municipality liable.

Table of Authorities

Cases considered by *J.C. Kubik J.*:

Hill v. Hill (2013), 2013 ABCA 313, 2013 CarswellAlta 1785, (sub nom. *Hill v. Hill Family Trust*) 561 A.R. 50, (sub nom. *Hill v. Hill Family Trust*) 594 W.A.C. 50, 3 Alta. L.R. (6th) 302 (Alta. C.A.) — considered

Remington v. Crystal Creek Homes Inc (2018), 2018 ABQB 644, 2018 CarswellAlta 1847 (Alta. Q.B.) — considered

Seidel v. Kerr (2004), 2004 ABCA 157, 2004 CarswellAlta 582, 348 A.R. 154, 321 W.A.C. 154, 27 Alta. L.R. (4th) 227, [2004] 8 W.W.R. 510 (Alta. C.A.) — referred to

Trizec Equities Ltd. v. Ellis-Don Management Services Ltd. (1999), 251 A.R. 101, 1999 ABQB 801, 1999 CarswellAlta 1469 (Alta. Q.B.) — considered

Weatherford Canada Partnership v. Addie (2018), 2018 ABQB 571, 2018 CarswellAlta 1501, 75 Alta. L.R. (6th) 248 (Alta. Q.B.) — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Generally — referred to

R. 10.29(1) — considered

R. 10.30(1)(c) — considered

R. 10.33 — considered

Tariffs considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Sched. C — referred to

Sched. C, Tariff of Costs, column 3 — referred to

Sched. C, Tariff of Costs, column 5 — referred to

ADDITIONAL REASONS to judgment reported at *McAllister v. Calgary (City)* (2018), 2018 ABQB 480, 2018 CarswellAlta 1178, 77 M.P.L.R. (5th) 270, 73 Alta. L.R. (6th) 310, 48 C.C.L.T. (4th) 132 (Alta. Q.B.), respecting costs.

***J.C. Kubik J.*:**

Introduction

1 This is my decision with respect to costs, arising from my trial decision in *McAllister v. Calgary (City)*, 2018 ABQB 480 (Alta. Q.B.). The trial was with respect to liability only. At this date damages have neither been settled nor determined at trial.

Issues

2 There are three general issues for my determination:

1. Whether the plaintiff's costs application is premature, owing to the fact that his damages have yet to be determined;

2. If not premature, whether costs should be awarded based on a partial indemnity of solicitor client fees incurred, or based on Schedule C of the *Alberta Rules of Court*, Alta Reg 124/2010; and

3. The reasonableness of expert fees incurred by the plaintiff, with respect to his retention of Dr. Randall Atlas.

Prematurity

3 The defendant argues that until the plaintiff's damages are settled or assessed, it is premature to determine his entitlement to costs.

4 The plaintiff argues that he was successful on the issue of liability, following a week-long trial, and should be entitled to an award of costs with respect to that step.

5 Rule 10.29(1) of the *Alberta Rules of Court* provides that:

> 10.29(1) A successful party to an application, a proceeding or an action is entitled to a costs award against the unsuccessful party, and the unsuccessful party must pay the costs forthwith, notwithstanding the final determination of the application, proceeding or action...

6 Further, 10.30(1)(c) the *Alberta Rules of Court* provides that:

> 10.30(1) Unless the Court otherwise orders or these rules otherwise provide, a costs award may be made:
>
> (c) in respect of trials and all other matters in an action, after judgment or a final order has been entered.

7 These Rules give the Court wide discretion in terms of the timing of orders for costs. In relation to bifurcated trials there is no hard and fast rule with respect to the timing of costs awards. Courts have both awarded costs following the liability trial, and deferred costs until after the determination of damages.

8 In this case, judgment has been entered with respect to liability. The parties engaged in a trial which lasted over one week, and a date to determine damages has not yet been scheduled. There is no good policy reason to defer the award of costs until damages are determined. While the defendant argues that it is impossible to determine which column of Schedule C to apply, given we are dealing with the issue of liability only, quantification of damages should not be a determinative factor in addressing reasonable costs. Rather, the Court can exercise discretion to determine those reasonable costs either by reference to Schedule C, having regard to the pleadings and the factors set out in Rule 10.33, or by considering partial indemnity costs.

